REPORT
ON
THE ENFORCEMENT OF JUDGMENT DEBTS AND RELATED MATTERS

ONTARIO LAW REFORM COMMISSION

PART V

Ministry of the
Attorney
General

1983

The Ontario Law Reform Commission was established by section 1 of the *Ontario Law Reform Commission Act*. Section 2(1) of the Act states that it is the function of the Commission to inquire into and consider any matter relating to (a) reform of the law having regard to the statute law, the common law and judicial decisions; (b) the administration of justice; (c) judicial and quasi-judicial procedures under any Act; and (d) any subject referred to it by the Attorney General. The Commissioners are:

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This Report is the last Part of a five Part Report. The Honourable J. C. McRuer and the Honourable G. A. Gale were signatories to the first three Parts, but, as will be noted, due to their retirement from the Commission, have not signed this Part. While the Commission benefited greatly from their knowledge and experience, and acknowledges its indebtedness to them, responsibility for the recommendations contained in this Report cannot be attributed to them.

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Ontario
Law Reform
Commission

The Honourable R. Roy McMurtry, Q.C.,
Attorney General for Ontario

Dear Mr. Attorney:

We have the honour to submit herewith Part V of our *Report on the Enforcement of Judgment Debts and Related Matters*.

CHAPTER 1

INTRODUCTION

Part V of the Commission's *Report on the Enforcement of Judgment Debts and Related Matters* deals with three disparate topics in the law of enforcement. Chapter 2 is concerned with the end result of the enforcement process – the distribution of proceeds realized from one or more of the remedies discussed in Parts II, III, and IV of our Report. In chapter 3, the Commission examines the law concerning postjudgment arrest of a defaulting debtor as an enforcement remedy. Finally, in chapter 4, the liability of sheriffs, creditors, and others in the enforcement of judgment debts is reviewed.

As is the case with most aspects of the law concerning the enforcement of judgment debts that the Commission has studied in earlier Parts of this Report, the areas of Ontario law canvassed in Part V, for the most part, have gone unexamined for a century or more. For example, the *Creditors' Relief Act*,[1] which is the focus of attention in chapter 2, remains little changed from when it was first enacted in 1881. A review of the postjudgment arrest provisions of the *Fraudulent Debtors Arrest Act*,[2] which also dates from the turn of the century, is long overdue, now more so than ever because of the proclamation last year of the *Canadian Charter of Rights and Freedoms*.[3] The present law relating to the liability of sheriffs, creditors, and others in the enforcement of judgment debts has developed willy-nilly over several centuries. A review of this area of enforcement law is required to ensure that it complements the new enforcement regime proposed by the Commission in earlier Parts of this Report. As in earlier Parts, our goal in recommending reform of the law in these important areas of debtor-creditor relations has been to bring certainty, clarity, and fairness to the law concerning the enforcement of judgment debts.

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[1] R.S.O. 1980, c. 103.

[2] R.S.O. 1980, c. 177.

[3] Being Part I of the *Constitution Act, 1982*, which is scheduled to the *Canada Act 1982*, c. 11 (U.K.), proclaimed in force on April 17, 1982.

CHAPTER 2

THE DISTRIBUTION OF PROCEEDS OF ENFORCEMENT

In Parts II and III of the *Report on the Enforcement of Judgment Debts and Related Matters*, the Commission was concerned with the methods of enforcement that should be available to a judgment creditor, and the property of a judgment debtor that may be secured for the satisfaction of an outstanding judgment debt.[1] In this chapter of Part V of the Report, we turn our attention to a different issue, that is, the distribution of proceeds of enforcement. We begin with a brief description of the events leading up to the enactment of the *Creditors' Relief Act*,[2] the statute that now governs the distribution of proceeds realized as a result of enforcement.

1. HISTORICAL BACKGROUND TO THE ENACTMENT OF THE *CREDITORS' RELIEF ACT*

Before the enactment of *The Creditors' Relief Act, 1880*,[3] proceeds of enforcement were distributed on a "first come, first served" basis. In other words, the judgment creditor who first initiated enforcement proceedings against the judgment debtor, by filing a writ of execution with the sheriff,[4] was entitled to have his judgment satisfied in full out of any enforcement proceeds that might come into the sheriff's hands before any of the proceeds were applied toward the satisfaction of judgment debts of subsequent creditors of the judgment debtor. Subsequent judgment creditors would be paid in full out of the remaining enforcement proceeds in the order in which they initiated enforcement proceedings against the debtor.

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[1] See Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (1981) (hereinafter referred to as "Commission Report"), Parts I, II, and III.

[2] *Creditors' Relief Act*, R.S.O. 1980, c. 103, first enacted as *The Creditors' Relief Act, 1880*, S.O. 1880, c. 10.

[3] *Supra*, note 2.

[4] While delivery of a writ of execution gave rise to a right of priority over writs of execution delivered subsequent in time, it should be noted that the priority secured by delivery could be relinquished by the judgment creditor instructing the sheriff to suspend execution: see *Halsbury's Laws of England* (4th ed., 1976), Vol. 17, "Execution", para. 439, at 262. See, also, Dunlop, *Creditor-Debtor Law in Canada* (1981), at 414. For references to the priority regime in effect before the enactment of the *Creditors' Relief Act*, see *Beekman v. Jarvis* (1847), 3 U.C.Q.B. 280; *Topping v. Joseph* (1859), 1 E. & A. 292; *Rowe v. Jarvis* (1863), 13 U.C.C.P. 495; and *Bank of Montreal v. Munro* (1864), 23 U.C.Q.B. 414.

Although mainly a common law creation,[5] by 1880 this "first come, first served" distribution scheme was also partly statutory. *The Common Law Procedure Act*[6] of 1857 had affected the distribution of enforcement proceeds in two ways. First, the Act empowered a sheriff, for the first time, to seize, *inter alia*, money and bank-notes belonging to a judgment debtor, and required him to pay or deliver up the same to the person "who sued out the execution".[7] Secondly, and more importantly, the 1857 *Common Law Procedure Act* settled the priority between writs of execution issued out of the Supreme Court and county courts, on the one hand, and warrants of execution issued out of the Division Courts, the precursors of the small claims courts, on the other. Where both a writ of execution and a warrant of execution were outstanding against the same judgment debtor, it was provided that the right to goods seized would be determined "by the priority of the time of the delivery of the writ to the sheriff to be executed, or the warrant to the bailiff of the . . . Division Court".[8]

The state of affairs just described continued until 1880, when, as we have indicated, *The Creditors' Relief Act, 1880* was enacted. It would appear that the reason for the enactment of this statute was the impending repeal of the 1875 Dominion *Insolvent Act*,[9] which would have left Ontario and the other provinces without any legislation under which the property of a financially embarrassed debtor could be required to be distributed equitably among all the creditors of the debtor.[10] With the repeal of Canada's only bankruptcy and insolvency legislation, creditors would be forced in every case to fall back on the "first come, first served" regime described above. Recognizing the need for and the desirability of "a measure of equal distribution of the property of execution creditors", the government of the day called for the enactment of suitable legislation in Ontario "without delay".[11]

The scheme of *The Creditors' Relief Act, 1880* may be described briefly as follows. Section 4 provided that "there should be no priority between or among creditors by execution from Superior or County Courts";[12] instead, such creditors were required to share rateably the proceeds realized from the seizure and sale of their judgment debtors' property. The Act, however, was not limited in its application to execution creditors. Non-

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[5] It would seem that this "first come, first served" scheme of distribution in respect of proceeds of enforcement was incorporated in the law of Upper Canada: see, now, *Property and Civil Rights Act*, R.S.O. 1980, c. 395.

[6] 20 Vict., c. 57 (U.C.).

[7] *Ibid.*, s. 22.

[8] *Ibid.*, s. 24.

[9] *Insolvent Act*, 38 Vict., c. 16. This Act had replaced the 1869 *Insolvent Act*, 32 & 33 Vict., c. 16. For a brief description of the differences between these two Acts, see Duncan and Honsberger, *Bankruptcy in Canada* (3d ed., 1961), at 15-16.

[10] "Bankruptcy and insolvency", it should be noted, are matters within the exclusive legislative authority of the Parliament of Canada under s. 91.21 of *The British North America Act, 1867*, 30 & 31 Vict., c. 3 (U.K.), R.S.C. 1970, Appendix II, No. 5 (now the *Constitution Act, 1867*).

[11] This statement was made in the Speech from the Throne on January 8, 1880. See Legislature of Ontario, *Debates* (1880).

[12] The Act did not apply to creditors by execution from the Division Courts.

judgment creditors, in certain circumstances, were also entitled to claim a share in a distribution of money levied upon an execution against the property of their debtor by utilizing the "certificate procedure" established under the Act.[13] The right of a non-judgment creditor to share in proceeds of enforcement was limited to cases in which his debtor permitted "an execution issued against him under which any of his goods or chattels [were] seized by the sheriff, to remain unsatisfied in the sheriff's hands till within two days of the time fixed by the sheriff for the sale thereof, or twenty days after such seizure".[14] In the case of an execution against his debtor's lands, a non-judgment creditor could claim a share in any enforcement proceeds where the execution was allowed "to remain unsatisfied for nine months after it is placed in the sheriff's hands".[15] It should be noted that only non-judgment creditors "in respect of debts which [were] overdue"[16] could resort to this special procedure.

The right of non-judgment creditors to share in money realized from execution was not an absolute one. Like the 1875 *Insolvent Act*[17] before it, *The Creditors' Relief Act, 1880* gave other creditors of the debtor, and the debtor himself, the right to dispute a non-judgment creditor's claim to a share of enforcement proceeds.[18]

Before moving on to discuss in detail the operation of the present *Creditors' Relief Act*, it may be useful to comment further on the 1880 Act. First, it should be noted that the Act abolished priority "between or among creditors by execution from Superior or County Courts". The Act did not comprehend creditors by execution from the Division Courts, now the small claims courts. Secondly, the 1880 Act, generally speaking, applied only to "creditors by execution". Consequently, money realized by means of garnishment, with some exceptions,[19] and money realized by other methods of enforcement, such as equitable execution or charging orders, was not required to be distributed rateably among all execution creditors and those non-judgment creditors entitled to share under the Act. In short, *The Creditors' Relief Act, 1880* was far from being a comprehensive scheme for the rateable distribution of all proceeds of enforcement.

Shortly after the Legislative Assembly of Ontario enacted *The Creditors' Relief Act, 1880*, most of the other provinces introduced similar legislation.[20] In 1919, the Parliament of Canada, re-entering a field it had

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[13] See discussion *infra*, this ch., sec. 3(b).

[14] See *The Creditors' Relief Act, 1880*, *supra*, note 2, s. 7. Interestingly, similar language was to be found in the 1875 *Insolvent Act*, *supra*, note 9. Section 3.*k* provided that a debtor who permitted an execution against him, under which any of his chattels, land, or property were seized, levied upon or taken in execution, to remain unsatisfied until within 4 days of the time that had been fixed for their sale, or for 15 days after such seizure, was deemed to be insolvent.

[15] *The Creditors' Relief Act, 1880*, *supra*, note 2, s. 7.

[16] *Ibid.*

[17] *Insolvent Act*, *supra*, note 9, ss. 93-96.

[18] *Supra*, note 2, s. 7(13)-(20).

[19] *Ibid.*, s. 21. For a discussion of this provision, see *infra*, this ch., sec. 2(b)(i).

[20] Alberta: *The Creditors' Relief Act*, S.A. 1910(2), c. 4; British Columbia: *Creditors Relief Act*, S.B.C. 1902, c. 17; Manitoba: *The Queen's Bench Act*, 58-59 Vict., c. 6;

left unoccupied for almost forty years, enacted the *Bankruptcy Act*.[21] Given the impetus for the enactment of creditors' relief legislation in the first place – the repeal of the *Insolvent Act* of 1875 – it is interesting to note that, since 1919, no province has repealed its creditors' relief legislation. Accordingly, bankruptcy legislation and creditors' relief legislation now exist side by side in seven of the ten provinces, and in both territories.[22]

2. THE SCOPE OF THE PRESENT *CREDITORS' RELIEF ACT*: PROCEEDS SUBJECT TO DISTRIBUTION

As we have seen, the purpose of Ontario's creditors' relief legislation is the abolition of priority among execution creditors. In this section, we shall consider the extent to which the present *Creditors' Relief Act*[23] succeeds in achieving this objective, and, in particular, the extent to which the proceeds of various enforcement remedies are subject to rateable distribution under the Act. We begin with an examination of the impact of the *Creditors' Relief Act* on the distribution of proceeds of execution issued out of the Supreme Court of Ontario, the county and district courts, the small claims courts, and the provincial courts (family division).

(a) EXECUTION

(i) The Supreme Court and the County and District Courts

The key provision, insofar as executions issued out of the Supreme Court and the county and district courts are concerned, is section 3 of the *Creditors' Relief Act*. This provision reads as follows:

> 3. Subject to this Act, there is no priority among creditors by execution from the Supreme Court or from a county court.

This section has remained virtually unchanged since *The Creditors' Relief Act, 1880*[24] was enacted and has given rise to no real problems. In the case of creditors by execution from the Supreme Court and the county and district courts, therefore, the Act has done away with the previously prevailing "first come, first served" regime, and replaced it with a scheme of rateable distribution.

New Brunswick: *Creditors Relief Act*, 3 Edw. 3, c. 3; Nova Scotia: *Creditors' Relief Act*, S.N.S. 1903, c. 14; and Saskatchewan: *The Creditors' Relief Act*, C.O. 1898, c. 26.

[21] S.C. 1919, c. 36. See, now, the *Bankruptcy Act*, R.S.C. 1970, c. B-3. Since 1975, there have been a number of bills introduced in Parliament for the enactment of a new *Bankruptcy Act*. The latest one is the *Bankruptcy Act, 1980*, Bill C-12, 1980 (32d Parl. 1st Sess.) (hereinafter referred to as "Bill C-12").

[22] Alberta: *The Execution Creditors Act*, R.S.A. 1980, c. E-14; British Columbia: *Creditor Assistance Act*, R.S.B.C. 1979, c. 80; Manitoba: *The Executions Act*, R.S.M. 1970, c. E160; New Brunswick: *Creditors Relief Act*, R.S.N.B. 1973, c. C-33; Nova Scotia: *Creditors' Relief Act*, R.S.N.S. 1967, c. 70; and Saskatchewan: *The Creditors' Relief Act*, R.S.S. 1978, c. C-46.

See, also, *Creditors' Relief Ordinance*, R.O.N.T. 1974, c. C-22, and *Creditors' Relief Ordinance*, C.O.Y.T. 1976, c. C-22.

[23] *Supra*, note 2.

[24] *Supra*, note 2.

(ii) The Small Claims Courts

By virtue of section 116 of the *Small Claims Courts Act*,[25] a creditor who has secured a small claims court judgment is entitled to execution against the goods and chattels of his judgment debtor. A small claims court judgment creditor also is entitled to request the issuance of an execution against the land of his judgment debtor, but only if the amount outstanding on the judgment is equal to or greater than $40.[26] At present, generally speaking, a "first come, first served" regime exists in the small claims courts: section 3 of the *Creditors' Relief Act*, it will be remembered, speaks only in terms of the abolition of priority "among creditors by execution from the Supreme Court or from a county court". A small claims court creditor may well be able to enjoy the fruits of his enforcement efforts without being required to share the proceeds with other small claims court judgment creditors subsequent in time, or with execution creditors from the Supreme Court and county and district courts.

There are, however, certain exceptions to this "first come, first served" regime. For example, section 25 of the *Creditors' Relief Act* prescribes a set of circumstances in which "property or proceeds . . . in the hands of the bailiff of a small claims court under an execution" may be required to be distributed *pro rata* in accordance with the Act. Section 25 states as follows:

> 25.-(1) If the sheriff does not find property of a debtor leviable under the executions and certificates in his hands sufficient to pay the same in full, but finds property or the proceeds thereof in the hands of the bailiff of a small claims court under an execution or attachment against the debtor, the sheriff shall demand and obtain them from the bailiff, who shall forthwith deliver them to the sheriff with a copy of every execution and attachment in his hands against the debtor and a memorandum showing the amount to be levied under the execution, including the bailiff's fees, and the date upon which each execution or attachment was received by him.
>
> (2) If the bailiff fails to deliver any of such property or the proceeds thereof, he shall pay double the value of that which is retained, which may be recovered by the sheriff from him with costs of suit, and shall be accounted for by the sheriff as part of the estate of the debtor.
>
> (3) The costs and disbursements of the bailiff are a first charge upon such property or the proceeds thereof and shall be paid by the sheriff to the bailiff upon demand after being taxed by the small claims court clerk.
>
> (4) The sheriff shall distribute the proceeds among the creditors entitled to share in the distribution, and the small claims court execution creditors are entitled without further proof to stand in the same position as creditors whose executions are in the sheriff's hands.

It should be pointed out, however, that, for two reasons, the rateable distribution of such property or proceeds is more a theoretical than a practical prospect.

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[25] *Small Claims Courts Act*, R.S.O. 1980, c. 476.

[26] *Ibid.*, s. 126(1).

First, the lack of coordination in enforcement activities among sheriffs and bailiffs, and the absence of any formalized exchange of information between such officials, makes it extremely unlikely that a sheriff will know when to rely on section 25. Secondly, it should be noted that this provision speaks in terms of the sheriff finding property or proceeds "in the hands of the bailiff of a small claims court". At the same time, the small claims courts rules of procedure require bailiffs to pay over money realized on an execution to the clerk of the small claims court.[27] Therefore, a sheriff will have only a very short time in which to call into play section 25 of the *Creditors' Relief Act*, making effective use of the section almost impossible.

It is arguable that a second exception to the "first come, first served" regime that generally prevails among small claims court execution creditors exists with respect to executions against land. While the matter is certainly not free from doubt, it would appear that the legal basis for this view is section 126(2) of the *Small Claims Courts Act*. This subsection provides that an execution against land issued out of a small claims court "has the same force and effect as an execution issued from a county court". As we have noted earlier, section 3 of the *Creditors' Relief Act* has abolished all priority among "creditors by execution from the Supreme Court or from a county court". Accordingly, it may be argued that the proceeds realized from an execution against land issued out of a small claims court are required to be distributed rateably. If, however, this is the case, it is difficult to see the purpose of section 126(4) of the *Small Claims Courts Act*, requiring the sheriff, to whom a small claims court execution will be directed, to "pay any money made thereon to the clerk of the court out of which the execution issued". This would be a seemingly pointless action if the sheriff were required to distribute these same proceeds in accordance with the terms of the *Creditors' Relief Act*.

(iii) The Provincial Courts (Family Division)

Section 27(2) of the *Family Law Reform Act*[28] empowers the provincial courts (family division) to issue execution in accordance with the rules of the court. However, the scheme of distribution that governs proceeds realized from such execution is unclear. The *Family Law Reform Act* is silent on this question, and the Rules of the Provincial Court (Family Division)[29] provide only the slightest indication of the applicability of the *Creditors' Relief Act* to such proceeds. Rule 80 of the Rules of the Provincial Court (Family Division) states that the sheriff to whom a writ of execution is delivered "shall make a return of [the] writ of execution and pay

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[27] Small claims courts Rules of Procedure, R.R.O. 1980, Reg. 917, r. 63.

[28] *Family Law Reform Act*, R.S.O. 1980, c. 152. It should be pointed out that, prior to the enactment of the *Family Law Reform Act*, the provincial courts (family division) were not empowered to issue execution. However, an order for maintenance made by a provincial court (family division) pursuant to *The Deserted Wives' and Children's Maintenance Act*, R.S.O. 1970, c. 128 (repealed by s. 76 of *The Family Law Reform Act, 1978*, S.O. 1978, c. 2) could be filed with the clerk of the small claims court and enforced by execution (s. 16).

[29] R.R.O. 1980, Reg. 810.

to the clerk of the court on behalf of the creditor *any money available* for distribution to the creditor".[30]

The present practice, based on Rule 80, would appear to be as follows. Once he is in receipt of proceeds realized upon a provincial court (family division) writ of execution, the sheriff determines the precise share to which the execution creditor would be entitled under the *Creditors' Relief Act*. The sheriff then pays to the clerk of the court, in accordance with Rule 80, only that amount "available for distribution to the creditor".

While we have been advised that this is the present practice in the case of writs of execution issued out of the provincial courts (family division), it is questionable whether the language of Rule 80 of the Rules of the Provincial Court (Family Division) supports it. This is particularly so, given the fact that section 3 of the *Creditors' Relief Act*, as in the case of small claims court execution creditors, makes no mention of creditors by execution from a provincial court (family division).

(b) Garnishment and Attachment of Wages

Having reviewed the extent to which proceeds from the seizure and sale of a judgment debtor's property are subject to the *Creditors' Relief Act*, we turn to examine the treatment under this Act of proceeds realized as a result of garnishment and attachment of wages proceedings.

(i) The Supreme Court and the County and District Courts

When enacted, *The Creditors' Relief Act, 1880*, with some exceptions, did not cover money realized as a result of garnishment proceedings. The Act was addressed to the abolition of priority among "creditors by execution". However, the Act did authorize the sheriff, where it appeared that the lands and goods of the debtor would not be sufficient to pay all the creditors who had filed an execution with him, to institute proceedings for the attachment of any debt owing to the execution debtor.[31] Section 21(1) of *The Creditors' Relief Act, 1880* provided that the proceeds realized from such proceedings were to be distributed "in the same manner as if [the sheriff] had realized the same from property seizable by him under execution". Reference should be made to one other provision of the 1880 Act concerning the proceeds of garnishment activity. Section 21(2) stated that, in the circumstances noted above, if the sheriff did not act, "any person entitled to distribution" could take such proceedings for the benefit of himself and all other persons entitled to distribution. Since money garnished and paid into the sheriff's hands was deemed to be money levied under execution,[32] it was required to be distributed in accordance with the terms of *The Creditors' Relief Act, 1880*.[33]

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[30] Emphasis added.

[31] *The Creditors' Relief Act, 1880, supra*, note 2, s. 21(1).

[32] *Ibid.*, s. 21(4).

[33] *Ibid.*, s. 5(1).

If nothing more had been said in the Act about the attachment of debts, the law in this regard would have been clear. However, the 1880 Act contained one other provision concerning garnishment that caused some confusion. Section 21(3) stated as follows:

> 21.-(3) Any judgment creditor who attaches a debt shall be deemed to do so for the common benefit of himself and all creditors entitled under this Act; payment of such debt shall be made to the sheriff, who in making distribution will apportion to such judgment creditor a share *pro rata*, according to the amount owing upon his judgment, of the whole amount to be distributed under the provisions of this Act, but such share shall not exceed the amount recovered by such garnishee proceedings unless the judgment creditor has placed a writ in the sheriff's hands . . . .

It was unclear whether section 21(3) was a general rule respecting garnishment or whether the provision was relevant only in the circumstances described in subsection (1) of section 21, that is, where several executions were in the sheriff's hands and the debtor's exigible property was not sufficient to pay his execution creditors in full.[34] The latter view seems to have prevailed in other provinces with similar legislation.[35]

In any event, the garnishment provisions of the Act were changed significantly in 1909[36] and have remained unaltered since that time. The general rule under the present *Creditors' Relief Act* with respect to the proceeds of garnishment proceedings in the Supreme Court and the county and district courts may be found in section 4(1): "[a] creditor who attaches a debt shall be deemed to do so for the benefit of all creditors of his debtor as well as himself". Pursuant to section 5 of the Act, all money received by the sheriff in respect of debts that have been attached must be distributed rateably among all those entitled to share.[37]

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[34] See *Re Thompson* (1896), 17 P.R. 109 (Div. Ct.).

[35] See *Slinger v. Davis* (1914), 20 B.C.R. 447 (S.C.); *Anderson v. Dawber* (1915), 22 B.C.R. 218, 9 W.W R. 511 (C.A.); *Hale v. Ross* (1958), 26 W.W.R. 47 (B.C.S.C.); and *Bank of Nova Scotia v. Newcombe Enterprises*, [1975] W.W.D. 115 (B.C.S.C.). See, also, *Halliday Craftsmen Ltd. v. Cogger* (1967), 64 D.L.R. (2d) 452 (N.S.S.C.).

[36] See *The Creditors' Relief Act*, S.O. 1909, c. 48, s. 5.

[37] While we are not aware of any difficulties regarding the distribution of proceeds of garnishment proceedings in the Supreme Court and county and district courts, we wish to make one comment regarding procedure. Section 4(2) of the *Creditors' Relief Act* states that a debt that has been attached shall be paid to the sheriff of the county in which the garnishee resides. The Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540 (hereinafter referred to as the "Rules of Practice"), on the other hand, speak in terms of payment into court by the garnishee. If, in practice, garnishees pay into court the amount garnished, how are such funds to reach the sheriff as required by section 4(2) of the *Creditors' Relief Act*? The authorized form of "Final Garnishment Order" under the Rules of Practice – Form 80 – contains the following provision:

> 2. And it is further ordered that the costs of the judgment creditor of this application be first paid from [the money paid into Court by the garnishee] and that the balance be then paid to the sheriff of the . . . . . of . . . . . to be dealt with under the *Creditors' Relief Act*.

Given the Commission's recommendation for enforcement office authority over garnishment generally (see Commission Report, *supra*, note 1, Part II, at 193-94), the existing circuitous procedure for the distribution of garnishment proceeds would be avoided, since such proceeds would be paid directly to the enforcement office.

(ii) The Small Claims Courts

Reference already has been made to section 4(1) of the *Creditors' Relief Act* and the general rule that a creditor who attaches a debt does so not only for himself but also for the benefit of all creditors of the debtor. In the case of garnishment proceedings in the small claims courts, this provision must be read together with section 4(3) of that Act, which provides as follows:

> 4.-(3) This section does not apply to debts attached by proceedings in a small claims court unless before the amount recovered by the garnishment proceedings is actually received by the creditor an execution against the property of the debtor is placed in the hands of the sheriff of such county.

Subsections (5) and (8) of section 4 are also relevant:

> 4.-(5) Where money that a sheriff is entitled to receive under this section is paid into a small claims court, the sheriff is entitled to demand and receive it from the clerk of the court for the purpose of distributing it under this Act.
>
> (8) If an attached debt that the sheriff is entitled to receive or any part of it is received by the attaching creditor, the sheriff may recover it from him; but a clerk of a small claims court is not liable for making payment to the creditor unless at the time of payment he has notice that there is an execution against the property of the debtor in the sheriff's hands.

However, as in the case of money realized from the seizure and sale of a debtor's goods and chattels under a small claims court execution, the rateable distribution of garnishment proceeds is little more than a theoretical possibility. The general lack of coordination between sheriffs and clerks of the small claims courts militates against the effective use of the provisions of the *Creditors' Relief Act* set out above. Without any formalized exchange of enforcement information between these officials, it is practically impossible for a sheriff to know when a small claims court clerk is in receipt of money that has been attached. Again, the problem is compounded by the fact that garnishment proceeds need be retained for only a short period of time before they may be paid over to the attaching creditor.[38]

(iii) The Provincial Courts (Family Division)

Under the *Family Law Reform Act*,[39] two different methods of enforcement are available to reach debts owing to a maintenance debtor by a third person: garnishment,[40] and, in the case of wages, an attachment of wages order that is continuing in nature.[41]

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[38] Section 146 of the *Small Claims Courts Act*, *supra*, note 25, allows a clerk of a small claims court to pay out money paid into court by a garnishee pursuant to a direction to garnish 15 days after the date of service on the judgment debtor of the direction to garnish.

[39] *Supra*, note 28.

[40] *Ibid.*, s. 27(2).

[41] *Ibid.*, s. 30.

Insofar as proceeds of garnishment in the provincial courts (family division) are concerned, section 27(2) of the *Family Law Reform Act* provides that subsection (3) of section 4 of the *Creditors' Relief Act* applies. Consequently, "unless before the amount recovered by the garnishment proceedings is actually received by the creditor an execution against the property of the debtor is placed in the hands of the sheriff", the attaching creditor will be entitled to the amount garnished. Even where an execution is placed in the sheriff's hands before the proceeds of garnishment are paid out pursuant to a notice to garnishee issued out of a provincial court (family division), the same practical obstacles described in the previous section that inhibit the rateable distribution of small claims court garnishment proceeds constrain the rateable distribution of provincial court (family division) garnishment proceeds.

Money collected by means of an attachment of wages order granted pursuant to section 30 of the *Family Law Reform Act* clearly is not subject to the scheme of distribution prescribed by the *Creditors' Relief Act*. Subsection (3) of section 30 of the *Family Law Reform Act* expressly provides that an attachment of wages order has priority "over any other seizure or attachment of wages arising before or after the service of the order". As can be seen from the language of the provision, section 30(3) gives an attaching creditor even greater rights than he or she would have under a "first come, first served" regime. Section 4(9) of the *Creditors' Relief Act* puts the matter beyond doubt. This section provides that the garnishment provisions of the *Creditors' Relief Act* do not apply to an attachment made under section 30 of the *Family Law Reform Act*.

(c) Equitable Execution, Charging Orders, and Stop Orders

In appropriate circumstances, a judgment may be enforced by means of the appointment of a receiver by way of equitable execution.[42] Although *The Creditors' Relief Act, 1880* did not comprehend proceeds realized from such enforcement activity, this gap has been closed. Sections 23 and 24 of the present *Creditors' Relief Act* state as follows:

> 23. Where there is in a court a fund belonging to an execution debtor or to which he is entitled, it or a sufficient part thereof to meet the executions and certificates in the sheriff's hands may, on the application of the sheriff or any person interested, be paid over to the sheriff, and it shall be deemed to be money levied under execution within the meaning of this Act.
>
> 24. Where a judgment creditor obtains the appointment of a receiver by way of equitable execution of property of his debtor, the receiver shall pay into court the money received by him by virtue of his receivership, and it is subject to section 23, but the creditor is entitled to be paid thereout the costs of and incidental to the receivership order and the proceedings thereon in priority to the claims of all other creditors.

Regarding charging orders, as we have indicated in Part II of the

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[42] For a detailed discussion of the remedy of equitable execution, see Commission Report, *supra*, note 1, Part II, ch. 4.

Report on the Enforcement of Judgment Debts and Related Matters,[43] there are for all practical purposes but two sets of circumstances in which a charging order now may be obtained: those described in section 146 of the *Judicature Act*[44] and those specified in Rule 551 of the Rules of Practice.[45] The former provision deals mainly with the enforcement of a judgment against government funds or annuities, and stock or shares of or in a public company in Ontario; the latter concerns the enforcement of a judgment against a partner in his personal capacity and the right to reach the partner's interest in partnership property and profits. Given the silence of the *Creditors' Relief Act* insofar as charging orders are concerned, it would appear, as has been suggested by at least one commentator,[46] that a creditor who resorts to either of the charging order remedies described would be entitled to a priority *vis-à-vis* other judgment creditors.

Finally, there is the question of the applicability of the *Creditors' Relief Act* to proceeds secured by a judgment creditor by means of the stop order remedy contained in Rule 730 of the Rules of Practice.[47] Under this Rule, a judgment creditor is able to reach money in court standing to the credit of his judgment debtor. This remedy is similar in effect to that available to a sheriff under section 23 of the *Creditors' Relief Act*, set out above. While it is clear that money secured by the sheriff under section 23 must be distributed pursuant to the *Creditors' Relief Act*, the fate of money realized by means of the procedure under Rule 730 is less certain.

(d) Proceeds of Attachment under the *Absconding Debtors Act*

The Commission discussed generally the operation of the *Absconding Debtors Act*[48] in chapter 2 of Part IV of the *Report on the Enforcement of*

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[43] *Ibid.*

[44] R.S.O. 1980, c. 223. This section has been omitted from the Proposed Revision of The Judicature Act, contained in Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980). Unfortunately, no reasons were given for the omission of this provision.

[45] *Supra*, note 37.

[46] See Ellis, "The Charging Order – A Neglected Means of Enforcement" (1962), 20 U.T. Fac. L. Rev. 35, at 41. See, however, *McDougall v. Inglis* (1909), 12 W.L.R. 78 (Alta. S.C.).

[47] *Supra*, note 37. Rule 730 reads as follows:

> 730.-(1) Any person claiming to be interested in, or to have a lien or charge upon, or an assignment of, any money or securities in court, or invested in the name of the Accountant, or any portion thereof, or claiming to have the same applied towards the satisfaction of any judgment or execution against the person to whose credit such moneys or securities stand, or for whose benefit the same are held by the Accountant may, upon an affidavit verifying his claim, apply *ex parte* for an order directing that such money or securities shall not be paid out or dealt with except upon notice to him (Form 73).
>
> (2) Where moneys are standing in court to the credit of any party, a person, having obtained the order in subrule (1) may, on notice to all interested persons apply to the court for an order directing payment out.

For the Commission's recommendations concerning this remedy, see Commission Report, *supra*, note 1, Part II, at 156-58.

[48] *Absconding Debtors Act*, R.S.O. 1980, c. 2.

Judgment Debts and Related Matters. In this section, we are concerned simply with the question whether proceeds realized as a result of attachment under the *Absconding Debtors Act* are subject to rateable distribution under the *Creditors' Relief Act*.

Section 5(1) of the *Creditors' Relief Act* makes money that the sheriff receives from the sale of a debt under section 15 of the *Absconding Debtors Act* subject to rateable distribution under the *Creditors' Relief Act*.[49] It is unclear, however, whether proceeds realized from the sale of property attached under the *Absconding Debtors Act* must be distributed in accordance with the *Creditors' Relief Act*.[50] Section 5(1) of the *Creditors' Relief Act* contains no express reference to such proceeds. Nevertheless, a reading of section 5(12) and section 21(1) of this Act suggests that the proceeds of attached property are governed by the *Creditors' Relief Act*.[51]

3. THE SCOPE OF THE PRESENT *CREDITORS' RELIEF ACT*: CREDITORS ENTITLED TO SHARE

In the previous section, the Commission considered the extent to which the present *Creditors' Relief Act* applies to the distribution of proceeds of the various enforcement measures that now may be employed by a judgment creditor against his judgment debtor. Our examination of this aspect of Ontario's creditors' relief legislation has led us to conclude that the *Creditors' Relief Act* is less than comprehensive in its abolition of priorities among judgment creditors. In this section, we look at another side of the comprehensiveness issue: what creditors are entitled to share in the enforcement proceeds that must be distributed rateably under this Act?

The key provisions of the *Creditors' Relief Act* in this regard are subsections (1) and (2) of section 5, which provide as follows:

> 5.-(1) Where a sheriff levies money under an execution against the property of a debtor or receives money in respect of a debt that has been attached or sold under section 15 of the *Absconding Debtors Act*, he shall forthwith make

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[49] Strangely, however, section 5(1) of the *Creditors' Relief Act* does not refer to proceeds realized from a suit brought to recover a debt owing to a debtor: see the *Absconding Debtors Act*, *supra*, note 48, s. 14.

[50] A debtor's attached property may be sold before judgment under ss. 8(1) and 12(2) of the *Absconding Debtors Act*, *supra*, note 48.

[51] These two provisions read as follows (emphasis added):

> 5.-(12) Where money in the hands of the sheriff for distribution is the *proceeds of the property of an absconding debtor against whom an order of attachment has been issued* under the *Absconding Debtors Act*, the period mentioned in subsection (2) is two months, and subsection (8) shall be read as if the words 'the month' in the first line were 'the two months'.
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> 21.-(1) Where proceedings have been taken against a debtor under the *Absconding Debtors Act* and his property has been attached under an order of attachment before an execution has been placed in the hands of the sheriff and *the money levied is the proceeds of such property or a part thereof*, the cost of the order of attachment, or, if there are more than one, the one first placed in the sheriff's hands and the proceedings thereon have priority over the claim of all other creditors.

an entry in Form 1 in a book to be kept in his office, and such book shall be open to the public for inspection without charge.

(2) The money shall thereafter be distributed rateably among all execution creditors and other creditors whose executions or certificates given under this Act were in the sheriff's hands at the time of the levy or receipt of the money or who deliver their executions or certificates to the sheriff within one month from the entry, subject to the provisions hereinafter contained as to the retention of dividends in the case of contested claims, and to the payment of the costs of the creditor under whose execution the amount was made, and subject also to subsection 4(6), and, as respects money recovered by garnishment proceedings, subject to the payment thereout to the creditor who obtained the attaching order of his costs of such proceedings.

While subsection (1) of section 5 refers to the proceeds of enforcement that must be recorded by the sheriff upon receipt, subsection (2) lists those creditors who are entitled to share in the proceeds. They fall into two groups: "execution creditors", that is, those creditors who have obtained judgment and filed an execution with the sheriff within the time prescribed by section 5(2); and "certificate creditors", that is, those non-judgment creditors who become entitled to share by filing with the sheriff a certificate obtained pursuant to sections 6 to 15 of the *Creditors' Relief Act*.

We begin with a discussion of the rights of "execution creditors" to share in proceeds of enforcement required to be distributed under the *Creditors' Relief Act*. In addition to Supreme Court and county and district court judgment creditors, reference will be made to the rights of judgment creditors of the small claims courts and provincial courts (family division) to share in a distribution of enforcement proceeds. We shall deal subsequently with the rights of "certificate creditors".

(a) Execution Creditors

The term "execution creditors" is not defined by the *Creditors' Relief Act*, although it certainly refers to Supreme Court and county and district court creditors who have secured and filed with the sheriff a writ of *fieri facias*.[52] Generally speaking, every execution creditor whose writ of *fieri facias* is in the sheriff's hands at the time of the levy or receipt of money referred to in section 5(1), or within one month of the entry required to be made by the sheriff under this section, is entitled to a *pro rata* share of such money.

In theory, garnishment creditors are provided with a more limited right to share in enforcement proceeds. Section 4(6) of the *Creditors' Relief Act* states as follows:

4.-(6) An attaching creditor is entitled to share in respect of his claim against the debtor in any distribution made under this Act, but his share shall not exceed the amount recovered by his garnishment proceedings unless he

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[52] The term "execution", defined in s. 1(*c*) of the *Creditors' Relief Act*, *supra*, note 2, includes "a writ of *fieri facias* and every subsequent writ for giving effect thereto".

> has in due time placed an execution or a certificate given under this Act in the sheriff's hands.

This limitation is more theoretical than real because judgment creditors or their legal advisors, as a matter of practice, will file a writ of execution as soon as possible after judgment has been issued and entered. Therefore, a garnishment creditor normally will be an execution creditor also and entitled to share in the proceeds of enforcement in accordance with section 5(2) of the *Creditors' Relief Act*.

Regarding the right of a creditor who has resorted to equitable execution, or one of the other enforcement measures the proceeds of which may or may not be subject to rateable distribution, the problem is similar to that with respect to garnishment creditors. In theory, even where the fruits of their enforcement efforts are required to be distributed pursuant to the *Creditors' Relief Act*, such creditors may not be entitled to receive a share of the proceeds: the term "execution creditor" is not likely to be interpreted to include a creditor relying on equitable execution, a charging order, or a stop order. Again, however, we would suggest that a creditor who has resorted to one of these enforcement remedies most likely will also have delivered to the sheriff a writ of execution. Accordingly, the creditor would be entitled, as an execution creditor, to share rateably in the proceeds of all enforcement measures taken against his judgment debtor.

Special mention should be made here of the rights of a creditor who has had property and debts of his debtor attached under the *Absconding Debtors Act*. Even where property or debts attached under this Act have been sold, the attaching creditor has no interest in the proceeds of sale until he has secured judgment against the debtor and placed a writ of execution in the hands of the sheriff, or has obtained and filed a certificate in accordance with the procedure discussed below. Nevertheless, the *Creditors' Relief Act* does contain a number of concessions insofar as such creditors are concerned. First, under section 21(1), an attaching creditor in certain circumstances may claim a priority over all other creditors in respect of "the cost of the order of attachment . . . and the proceedings thereon". This right to a priority is available where the property was attached "before an execution has been placed in the hands of the sheriff". Secondly, in the case of proceeds realized from attached property of an absconding debtor, the ordinary one month period during which executions and certificates may be filed with the sheriff is extended to two months.[53] It would appear that the time for filing was extended to allow a prejudgment attaching creditor more time to obtain a judgment and writ of execution. Of course, the attaching creditor would be free to obtain and file a certificate within the extended period.[54]

A further question concerns the rights of small claims court judgment creditors and provincial court (family division) maintenance creditors to

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[53] *Creditors' Relief Act*, *supra*, note 2, s. 5(12).

[54] The certificate procedure is discussed *infra*, this ch., sec. 3(b).

share in any proceeds of enforcement. The *Creditors' Relief Act* contains no reference to execution issued out of the provincial courts (family division). Accordingly, there is some doubt whether a provincial court (family division) maintenance creditor, who has obtained and delivered to the sheriff a writ of execution issued out of that court, would have the same right to share in enforcement proceeds as a creditor with a Supreme Court or county court writ of execution.[55] Although section 5(2) of the *Creditors' Relief Act* speaks in terms of "execution creditors", which would seem to comprehend provincial court (family division) execution creditors, it must be remembered that section 3 of this Act provides for the abolition of priority "among creditors by execution from the Supreme Court or from a county court".[56] On the other hand, the argument that provincial court (family division) execution creditors are entitled to share in a distribution under the *Creditors' Relief Act* is strengthened by the fact that, as discussed earlier,[57] proceeds realized pursuant to a provincial court (family division) execution are required, as a matter of practice, to be distributed in accordance with the *Creditors' Relief Act*.

While small claims court judgment creditors may or may not be considered "execution creditors" within the meaning of section 5(2),[58] they are entitled to share in a distribution of proceeds of enforcement pursuant to the *Creditors' Relief Act* under other provisions of that Act. First, where the sheriff has gone after property or proceeds thereof in the hands of the bailiff of a small claims court under subsection (1) of section 25, all "small claims court execution creditors are entitled without further proof to stand in the same position as creditors whose executions are in the sheriff's hands".[59] In these circumstances, in other words, they would become "execution creditors" within the meaning of section 5(2). Secondly, section 16 of the *Creditors' Relief Act* enables a small claims court judgment creditor to deliver to the sheriff "a certificate . . . of the amount of his judgment and of the costs to which he is entitled". Section 16 further provides that, for the purposes of the *Creditors' Relief Act*, such a certificate of judgment has "the same effect . . . as if the creditor had delivered to the sheriff an

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[55] For a discussion of this issue in the case of the British Columbia *Creditor Assistance Act*, *supra*, note 22, see Law Reform Commission of British Columbia, *Report on Creditors' Relief Legislation: A New Approach* (1979), at 55-56 (hereinafter referred to as "British Columbia Report").

[56] This despite the fact that the sheriff would be responsible for the enforcement of a provincial court (family division) writ of execution, and therefore would be the initial recipient of any proceeds realized thereunder.

[57] See discussion *supra*, this ch., sec. 2(a)(iii).

[58] Section 3 of the *Creditors' Relief Act* makes no mention of the small claims courts. However, as was discussed *supra*, this ch., sec. 2(a)(ii), a small claims court creditor does file his execution against land with the sheriff; accordingly, it may be argued not only that any proceeds from the sale of the debtor's land pursuant to such a writ must be distributed pursuant to the *Creditors' Relief Act*, but also that the small claims court creditor in such a case is an "execution creditor". The status of a small claims court judgment creditor with an execution against goods and chattels of the debtor is more questionable. Since this type of execution is delivered to the bailiff of the small claims court (*Small Claims Courts Act*, *supra*, note 25, s. 116(2)) rather than to the local sheriff, such an execution creditor is unlikely to fulfil all the conditions of section 5(2) of the *Creditors' Relief Act*, and accordingly will not be allowed to share in a distribution of the proceeds of the enforcement activity of other execution creditors.

[59] *Creditors' Relief Act*, *supra*, note 2, s. 25(4).

execution from a county court"; therefore, he too would be entitled to share in accordance with section 5(2) in a distribution under the *Creditors' Relief Act.*

(b) Certificate Creditors

As indicated, section 5(2) permits not only execution creditors to share under the *Creditors' Relief Act*, but also other creditors who file a certificate in accordance with the procedure prescribed by the Act. As will be recalled, *The Creditors' Relief Act, 1880* was not restricted in its application to judgment creditors,[60] but gave non-judgment creditors a right to share in the distribution of enforcement proceeds in certain circumstances. This right on the part of non-judgment creditors has been retained. In order to share, a non-judgment creditor must secure a "Certificate of Proof of Claim".[61] That an attaching creditor under the *Absconding Debtors Act* may rely on the certificate procedure of the *Creditors' Relief Act* is made very clear by section 17 of the former Act. This section provides that "[w]here the plaintiff desires to avail himself of the *Creditors' Relief Act*, he may, instead of proceeding with his action, obtain a certificate".

The circumstances in which a non-judgment creditor may apply for a certificate that entitles him to share in any distribution of enforcement proceeds are outlined in section 6(1) of the *Creditors' Relief Act*. A non-judgment creditor may resort to the certificate procedure where the debtor permits "an execution . . . under which any of his goods or chattels are seized . . . to remain unsatisfied in the sheriff's hands until within two days of the time fixed . . . for the sale thereof, or for twenty days after their seizure". He also may do so where an execution against his debtor's lands is allowed to remain unsatisfied for nine months. Unlike the 1880 Act, the present creditors' relief legislation even allows a non-judgment creditor with a claim not yet due to rely upon the certificate procedure where a sale has taken place under an execution.[62]

The procedure to be followed by a non-judgment creditor seeking a *Creditors' Relief Act* certificate is as follows. The creditor must serve his debtor[63] with a copy of an affidavit of claim in the prescribed Form,[64] along with the necessary notice regarding the creditor's claim for a certificate.[65] A copy of the affidavit of claim and the notice, as well as an affidavit of service thereof, must be delivered to the clerk of the county court of the county where the unsatisfied execution is filed.[66] In addition, the creditor is required to present to the clerk of the county court "a certificate of the sheriff, or an affidavit, showing that such proceedings [under section 6]

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[60] See discussion *supra*, this ch., sec. 1.

[61] *Creditors' Relief Act*, *supra*, note 2, Form 5.

[62] *Ibid.*, s. 6(2). The subsection does not differentiate between a sale of personalty and a sale of realty.

[63] *Ibid.*, s. 7(3).

[64] *Ibid.*, Form 2.

[65] *Ibid.*, Form 3.

[66] *Ibid.*, s. 8(5).

have been had against the debtor as entitle the creditor" to claim a certificate.[67] It should be noted that the Act does not require that a copy of the non-judgment creditor's affidavit of claim be filed with the sheriff, execution creditors, or other certificate creditors.

Once the material has been served on the debtor, he has ten days within which to contest the non-judgment creditor's claim.[68] Under section 9(1), if the debtor fails to contest the claim, the clerk of the county court, upon receipt of the documentation mentioned above, must issue a certificate. To contest the claim of a non-judgment creditor, the debtor simply must file with the county court clerk an affidavit "stating that he has a good defence to the claim or to a specified part of it on the merits".[69] Subsections (3) and (5) of section 10 of the *Creditors' Relief Act* also require the debtor to serve the creditor with a copy of this affidavit, together with a "notice of contestation". The onus then shifts to the creditor, who must apply within eight days of his receipt of the notice of contestation for an order allowing his claim; otherwise, "he shall be taken to have abandoned his claim".[70]

Regarding the procedure in the case of a contestation, section 13(1) of the *Creditors' Relief Act* provides that "[t]he judge may determine any question in dispute in a summary manner or may direct an action to be brought or an issue to be tried with or without a jury". Section 14 of the Act also concerns the procedures available in the case of a contestation. It reads as follows:

> 14. The same proceedings may be had for the production of documents and for the examination of parties or others, either before or at the trial, as may be taken in an ordinary action, and such proceedings may also be taken before the application to the judge, and as a foundation therefor.

As has been pointed out above, a creditor applying for a certificate need not serve any of the debtor's other creditors with a copy of the affidavit of claim or the prescribed notice. Nevertheless, creditors of the debtor also may contest the non-judgment creditor's claim.[71] Indeed, it would appear that the debtor's creditors, unlike the debtor, may contest a creditor's claim any time up until distribution.[72] As in the case of the debtor, a creditor wishing to contest a certificate must file an affidavit with the county court clerk.[73] However, section 10(4) states that, in his affidavit, a contesting creditor must also indicate "that he has reason to believe that the debt claimed is not really and in good faith due from the debtor to the claimant". In all other respects, the procedure is identical to that described above: the certificate creditor must apply for an order allowing

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[67] *Ibid.*, s. 7(2).

[68] *Ibid.*, s. 10(1), (2), and (3). Section 10(3) also authorizes a judge to extend the time within which a debtor may contest a claim.

[69] *Ibid.*, s. 10(2).

[70] *Ibid.*, s. 12(2).

[71] *Ibid.*, s. 10(1).

[72] *Ibid.*, s. 10(6).

[73] *Ibid.*, s. 10(4).

his claim within the time prescribed, and the judge may dispose of any question in dispute in the manner already outlined.

What then is the effect of a certificate obtained under section 9(1) of the *Creditors' Relief Act*? Generally speaking, a certificate has the same force and effect as an execution once it is delivered to the sheriff. Section 9(2) provides as follows:

> 9.-(2) Upon delivery of the certificate to the sheriff the claimant shall be deemed to be an execution creditor within the meaning of this Act, and is entitled to share in any distribution as if he had delivered an execution to the sheriff, and the certificate binds the lands and goods of the debtor in the same manner as an execution, subject, however, to the debt being afterwards disputed by a creditor as hereinafter provided.

The certificate also is deemed to be an execution for the purpose of interpleader proceedings,[74] and section 9(5) states that the sheriff, upon receipt of a certificate, "shall make a further seizure of the property of the debtor to the amount of the debt so claimed and the sheriff's fees". There is, however, one major difference between a writ of execution and a certificate secured under the *Creditors' Relief Act*. A writ of execution remains in force for six years;[75] a certificate is effective only for a period of three years.[76]

4. THE SCHEME OF DISTRIBUTION UNDER THE *CREDITORS' RELIEF ACT*

(a) Rateable Distribution

To this juncture, we have described in general terms proceeds required to be distributed under the *Creditors' Relief Act* and the persons who may be entitled to share in such proceeds. In this section, we take a closer look at the scheme of distribution under the Act, with a view to determining to what extent priority actually has been abolished among creditors, even creditors by execution from the Supreme Court and the county and district courts.

We already have discussed in some detail section 5(1) and (2) of the *Creditors' Relief Act*, perhaps the most important provisions of the Act. They outline the proceeds required to be distributed in accordance with the Act, and describe briefly the scheme of distribution. As we have seen, money required to be distributed under the Act must be distributed rateably. The sheriff is ordinarily required to wait one month from the time he receives any money before he distributes it, since not only those "execution creditors and other creditors whose executions or certificates . . . were in the sheriff's hands at the time of the levy or receipt of the money", but also those "who deliver their executions or certificates to the sheriff within one month" from such time, are entitled to share in the distribution.[77]

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[74] *Ibid.*, s. 9(3).

[75] Rules of Practice, *supra*, note 37, r. 566(1).

[76] *Creditors' Relief Act*, *supra*, note 2, s. 9(6).

[77] *Ibid.*, s. 5(2).

The meaning of the words "distributed rateably" in section 5(2) of the *Creditors' Relief Act* is dealt with further by section 26 of the Act. This provision states as follows:

> 26. Where the amount levied by the sheriff is not sufficient to pay the executions and certificates with costs in full, the money shall be applied to the payment rateably of such debts and costs of the creditors, after retaining the sheriff's fees including poundage, and after payment in full of the taxed costs and the costs of the execution to the creditor at whose instance and under whose execution the seizure and levy were made where he is entitled to priority therefor under this Act.

We shall return to the matter of priorities later in this chapter.[78]

Whenever a distribution is required to be made in accordance with section 26, the sheriff must comply with the following procedure. Before distributing any money, he must "first prepare for examination by the debtor and his creditors a list of the creditors entitled to share in the distribution, with the amount due to each for principal, interest and costs".[79] Pursuant to section 32(2), a copy of this list must be sent by registered mail to each creditor or his solicitor. Surprisingly, the Act does not obligate the sheriff to send a copy of the distribution list to the debtor. The creditors then have eight days within which to make an objection to the proposed scheme of distribution in the manner prescribed by section 32(5).[80] If there is no objection within that time, or within such further time as the judge may allow, distribution is to be made in accordance with the list.[81]

Where an objection is filed within the time stipulated, the sheriff still may distribute some of the money: he is entitled to "distribute rateably so much of the money made, and among such persons, as will not interfere with the effect of the objection in case it should be allowed".[82] However, unless the person objecting to the distribution list – "the contestant" – takes certain other steps, his objection will be taken as abandoned, and presumably the amount in dispute then could also be distributed.[83] Within eight days of filing an objection, the contestant must "apply to the judge for an order adjudicating upon the matter in dispute" and "obtain from the judge an appointment for hearing and determining the matter in dispute".[84] He then must serve the debtor and the other creditors with a copy of the appointment and a "Notice of Contestation of Scheme of Distribution" in Form 7.[85] An objection to the distribution list may be disposed of by the judge in the same manner as an objection to a claim by a non-judgment creditor for a certificate.[86] The amount in dispute should be

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[78] See discussion *infra*, this ch., sec. 4(b).

[79] *Creditors' Relief Act*, *supra*, note 2, s. 32(1).

[80] *Ibid.*, s. 32(3).

[81] *Ibid.*

[82] *Ibid.*, s. 32(4).

[83] *Ibid.*, s. 32(6).

[84] *Ibid.*, s. 32(7).

[85] *Ibid.*, s. 32(8).

[86] *Ibid.*, ss. 32(9) and 33. See *supra*, this ch., sec. 3(b).

distributed in accordance with the judge's determination of the objection.[87]

(b) Priorities

While the general scheme of the *Creditors' Relief Act* calls for the rateable distribution of proceeds of enforcement among those creditors entitled to share, there are a great many exceptions to this principle. First, the Act itself contains provisions granting priority to certain execution creditors. Secondly, there are a number of priorities available under other legislation such as, for example, the *Family Law Reform Act*[88] and the *Wages Act*.[89] Thirdly, the Crown will be exempt from the application of the Act. Fourthly, the common law and certain statutes create a number of liens and charges that must be satisfied out of proceeds realized upon the sale of a debtor's property pursuant to an execution. And, finally, the *Creditors' Relief Act* does not proscribe private payments by a debtor whereby he may frustrate the scheme of rateable distribution under the Act. These exceptions to the Act are discussed below.

(i) Priorities Prescribed by the *Creditors' Relief Act*

While most of the priorities granted under the *Creditors' Relief Act* are minor in nature, there are two priorities under the Act that evidence a substantial deviation from the principle of rateable distribution. We begin by examining these two major exceptions.

a. Payments by the Debtor without Sale

On two occasions, money received by the sheriff from the debtor does not have to be held for the one month period stipulated by section 5(2) of the *Creditors' Relief Act*. Under section 20(1) of the Act, if the debtor, without a sale by the sheriff, pays to the sheriff an amount sufficient to satisfy in full all executions and claims in his hands at that time, the money may be paid over without complying with section 5(1) and (2). The same is true where the debtor pays to the sheriff part of the amount owing in respect of a sole execution or certificate in the sheriff's hands at the time of the payment.[90]

b. Adverse Claims and Interpleader Proceedings

In chapter 5 of Part II of the *Report on the Enforcement of Judgment Debts and Related Matters*, the Commission described in considerable detail the law with respect to interpleader proceedings that may be taken to resolve disputes that develop in the course of enforcement proceedings between persons claiming an interest in property. Here we are concerned

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[87] *Ibid.*, s. 32(10).

[88] *Supra*, note 28, s. 30(3).

[89] *Wages Act*, R.S.O. 1980, c. 526, s. 3.

[90] *Creditors' Relief Act*, *supra*, note 2, s. 20(3).

solely with the interplay between the *Creditors' Relief Act* and interpleader.

Section 5(4) of the *Creditors' Relief Act* gives certain creditors a priority "[w]here proceedings are taken by a sheriff for relief under any provisions relating to interpleader". Section 5(4) reads as follows:

> 5.-(4) Where proceedings are taken by a sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute *pro rata* in proportion to the amount of their executions or certificates to the expense of contesting any adverse claim are entitled to share in any benefit that may be derived from the contestation of such claim so far as is necessary to satisfy their executions or certificates.

Therefore, while, under this provision, the enforcement proceeds will be distributed *pro rata* among the creditors entitled to share under section 5(4), not all creditors who would be qualified to share under section 5(2) will necessarily be entitled to a *pro rata* share.

It should be noted that Rule 642 of the Supreme Court of Ontario Rules of Practice[91] seems to suggest that the court has some discretion to permit a non-contributing creditor to share in the benefits of interpleader proceedings. The inconsistency between this Rule and section 5(4) of the *Creditors' Relief Act* would be resolved in favour of the latter under our earlier recommendations.[92]

c. The Costs of the First Instructing Execution Creditor

Under sections 5(2) and 26 of the *Creditors' Relief Act*, "the creditor at whose instance and under whose execution the seizure and levy were made" is entitled to "payment in full of the taxed costs and the costs of the execution" before any of the other creditors receive a share of any proceeds of enforcement. Two features of section 26 should be emphasized. First, in order to claim this priority, it is not sufficient to be the first creditor to have filed an execution; the creditor must be the first instructing execution creditor. Secondly, the section gives the creditor in question a priority in respect of not only the costs of execution but also his taxed costs of the action giving rise to the execution.[93]

d. The Costs of Garnishment Proceedings

A creditor responsible for the garnishment of a debt or debts owed to his debtor by a third person is entitled to recover the costs of the garnishment proceedings in priority to other creditors entitled to share in the proceeds.[94] This priority would seem to be available to any creditor who

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[91] Rules of Practice, *supra*, note 37.

[92] See Commission Report, *supra*, note 1, Part II, at 277.

[93] See *Royal Bank of Canada v. R. in right of Canada* (1981), 40 C.B.R. (N.S.) 27 (Ont. Div. Ct.).

[94] *Creditors' Relief Act*, *supra*, note 2, s. 5(2).

has attached debts owing to his debtor that are required to be distributed rateably in accordance with the *Creditors' Relief Act*; the fact that the attaching creditor is a small claims court or provincial court (family division) creditor is apparently irrelevant. It should be noted, however, that an attaching creditor, unlike the first instructing execution creditor, is not entitled to any priority with respect to "taxed costs".

e. The Costs of a Creditor Responsible for the Appointment of a Receiver by way of Equitable Execution

Previously in this chapter, we discussed whether proceeds realized by reason of the appointment of a receiver by way of equitable execution must be distributed rateably. Reference was made at that time to section 24 of the *Creditors' Relief Act*. While this section makes the proceeds of equitable execution subject to the Act's scheme of distribution, it also provides the creditor who obtained the appointment with a priority *vis-à-vis* other creditors for "the costs of and incidental to the receivership order and the proceedings thereon". Again, the creditor is given no priority for his "taxed costs".

f. The Costs of Proceedings under the Absconding Debtors Act

Where all or part of the proceeds to be distributed under the *Creditors' Relief Act* represent property attached under the *Absconding Debtors Act*,[95] the first attaching creditor is entitled to "the cost of the order of attachment . . . and the proceedings thereon" in priority to the claim of all other creditors.[96] In such a case, the first instructing execution creditor will not be able to claim the priority described above.[97]

g. Bailiff's Costs and Sheriff's Fees

In our examination of the applicability of the *Creditors' Relief Act* to the proceeds of execution from the small claims courts, we noted the power of the sheriff under section 25 of this Act to demand and receive any "property or the proceeds thereof in the hands of the bailiff of a small claims court under an execution or attachment against the debtor". Where a sheriff exercises this power, the costs and disbursements of the bailiff are protected, since section 25(3) states that these shall constitute a first charge upon the property or proceeds.

Similarly, the fees of the sheriff are fully protected where money is to be distributed rateably pursuant to the *Creditors' Relief Act*. Section 26 of the Act calls for rateable distribution of enforcement proceeds only after "the sheriff's fees including poundage" have been retained.[98]

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[95] See *supra*, this ch., sec. 2(d).

[96] *Creditors' Relief Act*, *supra*, note 2, s. 21(1).

[97] *Ibid.*, s. 21(2).

[98] For the meaning of poundage, see *infra*, note 123, and accompanying text.

h. The "Priority" under Section 32(11) and (12) of the Creditors' Relief Act

Section 32(11) and (12) of the *Creditors' Relief Act* is concerned with priorities among execution creditors in the case of a supervening security interest. These provisions apply where an execution is filed with the sheriff, property subject thereto is subsequently mortgaged, another execution is filed with the sheriff after the giving of the mortgage, and the mortgaged property is then sold pursuant to either writ of execution. The language of the two subsections is convoluted and unsatisfactory, to say the least, and provides as follows:

> 32.-(11) Where a debtor has executed a mortgage or other charge, otherwise valid, upon his property or a part thereof after the receipt of an execution by the sheriff and before distribution, such mortgage or charge shall not prevent the sheriff from selling the property under an execution or certificate placed in his hands before distribution as if such mortgage or charge had not been given, nor prevent creditors whose executions or certificates are subsequent thereto from sharing in the distribution; but, in distributing the money realized from the sale of such property, the sheriff shall deduct and pay to the person entitled thereto the amount of such mortgage or charge from the amount that would otherwise be payable out of the proceeds of such property to such subsequent creditors.
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> (12) In the case provided for in subsection (11), the sheriff shall prepare a separate scheme of distribution of the proceeds of the encumbered property without reference to the mortgage or charge, and from the dividends payable according to such scheme to subsequent creditors there shall be deducted the amount of the mortgage or charge, and the amount so deducted shall be paid to the encumbrancer.

Until 1899, the Ontario *Creditors' Relief Act* was silent respecting the priorities of execution creditors in the case of a supervening security interest. As a result, despite the guiding principle of rateable distribution enshrined in the Act, courts concluded that a subsequent execution creditor was not entitled to share in the proceeds of enforcement to which the first execution creditor was entitled; the subsequent execution creditor, it was held, was only entitled to the proceeds representing the debtor's interest in the property, that is to say, the debtor's equity of redemption.[99] Despite the enactment in 1899 of what is now section 32(11) and (12),[100] Ontario courts still distribute proceeds of enforcement in the circumstances under discussion as if the common law position had not been affected by the introduction of section 32(11) and (12).[101] As a result, the first execution creditor enjoys a priority over the subsequent execution creditor, contrary to the directive in section 3 of the Act that "there is no priority among creditors by execution from the Supreme Court or from a county court".

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[99] See, for example, *Roach v. McLachlan* (1892), 19 O.A.R. 496. See, also, the cases cited in Dunlop, *supra*, note 4, at 439, *n.* 28.

[100] See *An Act to amend the Statute Law*, S.O. 1899, c. 11, s. 13.

[101] See, for example, *Union Bank of Canada v. Taylor* (1915), 33 O.L.R. 255 (H.C. Div.).

(ii) Other Statutory Priorities

The principle of rateable distribution embodied in the *Creditors' Relief Act* has been diluted further by the creation of a number of other statutory exceptions. The most important of these exceptions concern maintenance creditors and wage creditors.

a. The Priority for Maintenance Creditors

Until the enactment of the *Family Law Reform Act*, maintenance creditors were entitled to no special priority in the distribution of proceeds of enforcement: they were forced to share rateably even the enforcement proceeds realized as a result of their own efforts.[102] This state of affairs has been modified somewhat by section 30(3) of the *Family Law Reform Act*. Section 30 of the Act, in addition to enabling a maintenance creditor to attach the wages of the maintenance debtor on a continuing basis, gives an attachment of wages order "priority over any other seizure or attachment of wages arising before or after the service of the order". Granted, this priority, on its face, is very limited in scope. However, given the means of most maintenance debtors, the priority granted maintenance creditors under section 30(3) is, practically speaking, very significant.

b. The Priority for Wage Creditors

At the present time, both the *Wages Act*[103] and the *Employment Standards Act*[104] contain a provision giving wage creditors a limited priority over all other creditors. Section 3 of the *Wages Act* provides as follows:

> 3. All persons who, at the time of the seizure by the sheriff or who within one month prior thereto, were in the employment of the execution debtor, and who become entitled to share in the distribution of money levied out of the property of a debtor within the meaning of the *Creditors' Relief Act* are entitled to be paid out of such money the wages due to them by the execution debtor, not exceeding three months wages, in priority to the claims of the other creditors of the execution debtor, and are entitled to share *pro rata* with such other creditors as to the residue, if any, of their claims.

Section 14 of the *Employment Standards Act*, on the other hand, reads as follows:

> 14. Notwithstanding the provisions of any other Act and except upon a distribution made by a trustee under the *Bankruptcy Act* (Canada), wages shall have priority to the claims or rights, including the claims or rights of the Crown, of all preferred, ordinary or general creditors of the employer to the extent of $2000 for each employee.

While a comparison of these two provisions discloses a number of significant differences, the need for two such provisions is not readily apparent.

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[102] See *Billinghurst v. Billinghurst* (1977), 3 C.P.C. 247 (S.C.O. Master).

[103] *Supra*, note 89.

[104] *Employment Standards Act*, R.S.O. 1980, c. 137.

(iii) The Priority of the Crown: The Royal Prerogative

At common law, the sovereign enjoys a great many privileges and immunities, generally known as royal prerogatives. One of these is of particular interest in the present context. Longstanding authority supports the proposition that, "when the rights of the Crown come in conflict with the right of a subject in respect to the payment of debts of equal degree, the right of the Crown must prevail".[105] Accordingly, when the Crown is one of a number of execution creditors asserting a claim to proceeds of enforcement, the Crown will be entitled to be paid in full in priority to the other execution creditors. Both the Crown in right of Canada and the Crown in right of any of the provinces enjoy this prerogative. It is a right that has not been abrogated by the *Creditors' Relief Act*, although it has been affected by both provincial[106] and federal legislation.[107] It also should be pointed out that it does not seem that this right to a priority may be waived or lost by laches.[108]

While there is some doubt about the matter, it would appear that, where both the Crown in right of Canada and the Crown in right of a province assert a claim to the same proceeds of enforcement, their claims rank *pari passu;* each is entitled to a *pro rata* share of the proceeds in priority to all other execution creditors.[109] Other uncertainties surround this royal prerogative. For example, although it would appear that Parliament may enact legislation impinging upon the prerogative right of the Crown in right of Ontario, there is some doubt whether the provincial legislature can constitutionally enact legislation proscribing the prerogative right of the Crown in right of Canada.[110] Other unresolved questions regarding the

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[105] See *The Queen v. Bank of Nova Scotia* (1885), 11 S.C.R. 1, at 10, *per* Ritchie C.J. For a recent reaffirmation of this principle, see *Household Realty Corp. Ltd. v. A. G. Can.*, [1980] 1 S.C.R. 423, at 426-27, 105 D.L.R. (3d) 266, *per* Ritchie J., delivering the judgment of the Court. For a detailed discussion of royal prerogatives, see Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820); Robertson, *The Law and Practice of Civil Proceedings by and against the Crown* (1908); and Dunlop, *supra*, note 4, at 446-54. See, also, Law Reform Commission of British Columbia, *Report on The Crown as Creditor: Priorities and Privileges* (1982), at 7-9 (hereinafter referred to as "British Columbia Priorities Report").

[106] See, for example, the *Employment Standards Act*, *supra*, note 104, s. 14.

[107] See the *Bankruptcy Act*, *supra*, note 21, s. 107.

[108] See *The Queen v. Bank of Nova Scotia*, *supra*, note 105; *R. v. Hamilton* (1962), 37 D.L.R. (2d) 545, 39 W.W.R. 545 (Man. Q.B.); *Cumming v. Stroud* (1961), 28 D.L.R. (3d) 366, 35 W.W.R. 4 (Sask. C.A.) (priority not lost by filing execution); and *Re Marten; Royal Bank of Canada v. The Queen* (1981), 34 O.R. (2d) 399 (Div. Ct.). Compare *Tudor Holdings Ltd. v. Robertson* (1974), 43 D.L.R. (3d) 752, [1974] 2 W.W.R. 546 (B.C.S.C.).

[109] *Re Silver Bros. Ltd.; A. G. Can. v. A. G. Que.*, [1932] A.C. 514, [1932] 2 D.L.R. 673 (P.C.). See, also, *Re Walters Trucking Service Ltd.* (1965), 50 D.L.R. (2d) 711 (Alta. S.C., App. Div.), and *Re Yancey's Men's Wear Ltd.* (1982), 17 Sask. R. 287 (Q.B.).

[110] Regarding the power of the federal government to impinge upon the provincial Crown's right to a priority, see *Re Cardston U. F. A. Co-op. Ass'n Ltd., Ex parte The King*, [1925] 4 D.L.R. 897, [1925] 3 W.W.R. 651 (Alta. S.C. in Bktcy). Insofar as the power of a provincial government to affect the federal Crown prerogative is concerned, see *Re Adams Shoe Co. Ltd.* (1923), 54 O.L.R. 625, [1923] 4 D.L.R. 927 (S.C.O. in Bktcy); *Emerson v. Simpson* (1962), 32 D.L.R. (2d) 603, 38 W.W.R. 466 (B.C.S.C.); and *Re Sternschein* (1965), 50 D.L.R. (2d) 762, 51 W.W.R. 437 (Man. Q.B.). See, also, the discussion of this issue in the British Columbia Priorities Report, *supra*, note 105, at 40-41.

prerogative right of priority *vis-à-vis* execution creditors of equal degree concern the applicability of this prerogative to Crown debts that are commercial in nature,[111] and the right of Crown agencies and statutory authorities to rely on it.[112]

It should be apparent that the Crown's right to a priority respecting proceeds of enforcement constitutes a major exception to the principle of rateable distribution that is central to the *Creditors' Relief Act*. Indeed, the very fact that the Act introduces a delay period of a month, in most instances where enforcement proceeds have been realized, has enhanced the importance of the common law Crown priority. The ability of the provincial Crown and the federal Crown to "snatch" the fruits of the enforcement efforts of ordinary execution creditors is certainly one of the features of the law pertaining to the distribution of proceeds of enforcement that is most often criticized.

(iv) Statutory and Common Law Liens and Charges

In addition to Crown priorities, and equally troublesome from the point of view of ordinary execution creditors, is the plethora of statutory liens to which both provincial and federal legislation has given rise. Most of these may be characterized as government liens, since they are in favour of some level of government, be it federal, provincial, or municipal.[113] Some liens, however, have been created to provide individual, as opposed to government, creditors with security for a debt owed to them.[114]

It is important to recognize the difference between the common law Crown priority, discussed in the preceding section, and a lien in favour of a creditor of the debtor. While both may result in frustration of the enforcement efforts of an ordinary execution creditor, they are quite different in substance. The Crown's right to priority may be lost unless the Crown asserts it before the proceeds of enforcement are distributed. The same generally is not true of statutory liens: a creditor's right to the property of his debtor that is impressed with a statutory lien is subject to the rights of the lienholder in that property. If the property has been seized and sold by the sheriff under a writ of execution, the only proceeds that will be available for distribution in accordance with the *Creditors' Relief Act* are those in excess of the amount of the lien. Since the judgment creditor stands in the shoes of his judgment debtor, he is entitled only to that

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[111] See *The Queen v. Workmen's Compensation Board* (1962), 36 D.L.R. (2d) 166, 39 W.W.R. 291, aff'd (1963), 40 D.L.R. (2d) 243, 42 W.W.R. 226 (Alta. S.C., App. Div.). See, also, *Food Controller v. Cork*, [1923] A.C. 647, [1923] All E.R. Rep. 463 (H.L.); *Re Cardston U. F. A. Co-op. Ass'n Ltd., Ex parte The King*, *supra*, note 110; *Crowther v. A. G. Can.* (1959), 17 D.L.R. (2d) 437, 42 M.P.R. 269 (N.S.S.C., App. Div.); *Alberta Government Telephones v. Selk*, [1974] 4 W.W.R. 205 (Alta. Dist. Ct.); and *Bank of Nova Scotia v. Hart*, [1981] 1 W.W.R. 552 (Alta. Q.B.).

[112] See *The Queen v. Workmen's Compensation Board*, *supra*, note 111, and *Tamlin v. Hannaford*, [1950] 1 K.B. 18, [1949] 2 All E.R. 327 (C.A.).

[113] See British Columbia Priorities Report, *supra*, note 105, chs. V-VII.

[114] For example, section 15 of the *Employment Standards Act*, *supra*, note 104, provides that vacation pay accruing due to an employee becomes "a lien and charge upon the assets of the employer".

which the debtor owned at the time of the delivery of the writ. In other words, from the perspective of an ordinary judgment creditor, a lienholder is little different from a secured creditor.

The significance of many of the statutory liens and charges now extant in provincial and federal law is increased by the fact that most of them are not required to be recorded in any public register. For example, the Ontario *Personal Property Security Act*[115] does not cover statutory liens. Section 3(1)(*a*) provides that, subject to a few narrow exceptions, the Act "does not apply . . . to a lien given by statute or rule of law". Given the number of statutory liens and charges now in existence, it is extremely difficult, if not impossible, for an execution creditor to determine to what extent, if any, his debtor's property is subject to such liens and charges. The execution creditor wishing to pursue enforcement remedies against his debtor, therefore, must do so at his own risk: he may well incur substantial costs only to find out subsequently that the proceeds of enforcement realized as a result of his efforts belong to one or more of the debtor's unregistered lienholders. One can only conclude, therefore, that the principle *caveat creditor* – let the creditor beware – prevails in this area of the law of the enforcement of judgment debts.

The plethora of liens, both statutory and common law, creates difficulties not only for execution creditors, but also for lienholders. For example, one problem that arises with seeming regularity concerns the distribution of proceeds of enforcement where more than one lien claimant claims to be entitled to the proceeds. The sheriff now is frequently asked to determine the priorities between lienholders, as well as to resolve disputes among lienholders and execution creditors. Unfortunately, present legislation provides the sheriff with little or no guidance concerning the order of priorities among competing lienholders, with the result that disputes are not resolved in any uniform fashion, and all too often must be untangled by costly, and in the Commission's view unnecessary, litigation.

This problem is made more intractable by the fact that there is little or no uniformity in the language employed to create a great many statutory liens. How, for example, is a sheriff, charged with the responsibility of distributing enforcement proceeds, to determine priorities among a "first lien",[116] a "special lien",[117] and a "lien and charge"?[118] Solomon himself would have had difficulty fashioning a solution to this problem. The sheriff's responsibility may be complicated further by the fact that some of the lien claimants are the federal government and federal agencies, while others are the provincial government and individuals entitled to a lien against some or all of the debtor's property.

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[115] R.S.O. 1980, c. 375.

[116] See *The Corporations Tax Act, 1972*, S.O. 1972, c. 143, s. 167(1), since repealed and replaced by s. 1 of *The Corporations Tax Amendment Act, 1979 (No. 2)*, S.O. 1979, c. 89.

[117] See, for example, the *Municipal Act*, R.S.O. 1980, c. 302, s. 369.

[118] *Crown Timber Act*, R.S.O. 1980, c. 109, s. 21.

(v) Private Payments

In the preceding sections of this chapter, the focus of discussion has been the wide variety of priorities that have been created by law and that substantially dilute the principle of rateable distribution enshrined in the *Creditors' Relief Act*. However, perhaps an even more significant breach in the aforementioned principle is the result not of legally sanctioned priorities, but of the actions of the debtor himself. By making private payments to his judgment creditors, the debtor can circumvent the *Creditors' Relief Act* almost entirely. There is nothing in the present Act to prevent a judgment debtor from establishing his own system of priorities by paying his judgment debts in the order that is most beneficial to him. Nor does the Act prohibit a judgment creditor from accepting a private payment from his debtor in satisfaction of his outstanding judgment debt. And this is the case even where the creditor himself has commenced enforcement proceedings against the debtor by delivering a writ of execution to the sheriff.

At the present time, such private payments may run afoul of the *Assignments and Preferences Act*[119] and, as a result, may be declared void and set aside by the courts. However, as we pointed out in chapter 3 of Part IV of our *Report on the Enforcement of Judgment Debts and Related Matters*,[120] concerned with what we have referred to as voidable transactions, section 4(2) of the *Assignments and Preferences Act* only prohibits payments to creditors where the debtor is insolvent, on the eve of insolvency, or unable to pay his debts in full, and where the debtor has the intent to prejudice creditors. We shall return to the subject of private payments later in this chapter.

5. THE NEED FOR REFORM

Creditors' relief legislation, as stated at the beginning of this chapter, is to be found in the majority of common law jurisdictions in Canada. Even in Quebec, where a judgment debtor is shown to be insolvent, moneys levied are required to be distributed "pro rata between the ordinary creditors who have filed their claims".[121] At the same time, it should be pointed out that creditors' relief legislation of the sort described above appears to be unique to Canada. In most other jurisdictions, a "first come, first served" regime for the distribution of enforcement proceeds seems to prevail. The fact that creditors' relief legislation appears to be indigenous to Canada can be explained by the disappearance in the 1880s of all Canadian bankruptcy and insolvency legislation, a state of affairs that existed for nearly forty years, and one that perhaps has not been seen elsewhere. This does not explain, however, the co-existence in Canada of creditors' relief legislation and bankruptcy legislation since 1919. Certainly, the time has come to re-examine the need for creditors' relief legislation in Ontario.

That reform of the present *Creditors' Relief Act* is long overdue is

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[119] R.S.O. 1980, c. 33.

[120] Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (1983), Part IV.

[121] See *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 578.

beyond doubt. As has been stated elsewhere, the language of the present Act is both "archaic and obscure to the modern reader".[122] For example, a number of sections of the Act refer to the sheriff's right to collect poundage,[123] whereas in practice poundage is never claimed. Indeed, the Ontario Rules of Practice no longer refer to poundage, but rather to the sheriff's fees and expenses.[124] Another example of the antiquated nature of the Act is the reference in section 5(10) to "executions against goods or lands only or against goods and lands". Yet, writs of execution issued out of the Supreme Court or county and district courts in Ontario have bound both goods and lands since at least 1909.[125] The terminology of the Act is also woefully inconsistent; for example, the words "creditor" and "claimant" seem to be used interchangeably.[126] The order in which some of the provisions appear in the Act is confusing, particularly in the case of the provisions respecting the certificate procedure. In short, the drafting of the Act is, in our view, totally inadequate, and the Act, if found still to serve some useful function, should be redrafted to reflect at least present legal realities.

However, the outdated language and loose drafting of the *Creditors' Relief Act*, by themselves, do not warrant the Act's repeal. We turn now to consider some of the more substantial deficiencies of the Ontario *Creditors' Relief Act*.

Undoubtedly, a most serious failing of the present creditors' relief legislation is the fact that it is less than comprehensive in scope. Not all proceeds of enforcement are required to be distributed in accordance with the Act; nor does it seem that all enforcement creditors are entitled to share in the proceeds of enforcement in the same way. A great many statutory liens and priorities have grown up around the Act, in many cases frustrating the purpose of the Act.[127] Even assuming that all these liens and priorities are to be retained, it is our view that some attempt must be made to rationalize them in order to facilitate the distribution of enforcement proceeds. Then, of course, there is the problem of the right of the Crown, as execution creditor, to take in priority to all other execution creditors.[128] And finally, we have the right of the debtor to create, in effect, his own scheme of distribution by making private payments to his judgment creditors.[129] However, while all these shortcomings of the present Act are serious in nature, they do not, in our view, justify reversion to a "first come, first

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[122] See Law Reform Commission of British Columbia, *Working Paper No. 21, The Enforcement of Judgments: The Creditors' Relief Act* (n.d.), at 35 (hereinafter referred to as the "British Columbia Working Paper No. 21").

[123] See, for example, ss. 4(7), 26, and 28 of the *Creditors' Relief Act*, *supra*, note 2. "Poundage fees" is defined in *Black's Law Dictionary* (5th ed., 1979) as an "allowance to the sheriff of so much upon the amount levied under an execution".

[124] Rules of Practice, *supra*, note 37, r. 550.

[125] See *The Execution Act*, S.O. 1909, c. 47, s. 9, and see, now, the *Execution Act*, R.S.O. 1980, c. 146, s. 10. The same is not true under the *Small Claims Courts Act*, *supra*, note 25: see discussion *supra*, this ch., sec. 2(a)(ii).

[126] See ss. 6-10, 17, and 18 of the *Creditors' Relief Act*, *supra*, note 2.

[127] See *supra*, this ch., sec. 4(b)(iv).

[128] *Ibid.*, sec. 4(b)(iii).

[129] *Ibid.*, sec. 4(b)(v).

served" distribution regime. Rather, it would be quite possible, assuming the desirability of a scheme of rateable distribution, to design a much more comprehensive *Creditors' Relief Act*.

A more serious charge that has been levelled against creditors' relief legislation is that it is inherently unfair: it rewards the creditor actively pursuing his enforcement remedies too little and the idle creditor too much. It legitimizes parasitic behaviour on the part of some creditors, while militating against resort to enforcement proceedings by others; for example, a creditor with a small claim, willing to run a high risk if he can enjoy all the fruits of his efforts, may be unwilling to take such a risk knowing that he must share his spoils. These arguments against creditors' relief legislation were among those that convinced the Law Reform Commission of British Columbia to recommend repeal of that Province's creditors' relief statute in its 1979 *Report on Creditors' Relief Legislation: A New Approach*.[130]

It should be pointed out, however, that a "first come, first served" regime for the distribution of proceeds of enforcement also may produce its share of unfairness.[131] Under such a regime, priority may well be determined by irrelevant, as well as fortuitous, circumstances; for example, proceedings in one court or in one jurisdiction may be concluded more quickly than in another. It may be questioned whether "commercial morality [would be more] significantly advanced"[132] by such a regime than by the present creditors' relief regime.

Also among arguments advanced for the repeal of the British Columbia *Creditors' Relief Act*[133] by the Law Reform Commission of British Columbia in its 1979 Report was the administrative complexity of that Act, or of a more comprehensive "ideal" Act, when compared with a "first come, first served" distribution scheme.[134] We do not find this argument to be compelling. In the view of this Commission, the cumbersomeness of the present Ontario *Creditors' Relief Act* is due in large part to the existence of the certificate procedure described earlier in this chapter. Yet, from the evidence available to us, it seems that the certificate procedure is resorted to but rarely.[135] In our opinion, the abolition of the certificate procedure could well minimize administrative inefficiency, with little or no practical effect on the principle of rateable distribution.

A further question is whether creditors' relief legislation is needed if

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[130] See British Columbia Report, *supra*, note 55, at 21.

[131] *Ibid.*, at 6.

[132] *Ibid.*, at 17.

[133] R.S.B.C. 1960, c. 85. See, now, the B.C. *Creditor Assistance Act*, *supra*, note 22.

[134] British Columbia Report, *supra*, note 55, at 17-18.

[135] In its review of Ontario's *Creditors' Relief Act*, the Commission undertook an examination of the operation of this legislation in the Judicial District of York in the year 1977. The Commission examined all the distribution lists prepared by the Sheriff of the Judicial District of York in that year. It was learned that in 1977 the sheriff paid out approximately 800 dividends pursuant to the *Creditors' Relief Act*. Only one of these dividends, or .00125 percent, was paid to a certificate creditor.

the principle of equality of distribution is enshrined in comprehensive bankruptcy and insolvency legislation, such as the *Bankruptcy Act*.[136] Clearly, the Law Reform Commission of British Columbia, in its 1979 *Report on Creditors' Relief Legislation: A New Approach*, was of the view that, given the existence of federal bankruptcy and insolvency legislation, the provincial statute served little or no purpose. The Commission commented as follows:[137]

> Finally, the existence of Federal insolvency legislation is relevant to a consideration of repeal. It is not unusual to find both Federal and Provincial governments, through legislation, pursuing similar policies with respect to the same subject-matter. Leaving aside questions of constitutional law, such a situation does not necessarily lead to the conclusion that one or the other should withdraw from the field. But where other factors suggest that a withdrawal by one may be appropriate, the presence of the other serves to rebut any argument that such a withdrawal would leave an undesirable void.
>
> This is the case with the *Creditors' Relief Act*. If the Act were to be repealed and the first-in-time rule reinstated, the creditor who was not first would not be left without a remedy. In [most] cases he could have recourse to the *Bankruptcy Act* to ensure that a distribution occurred if he wished to pursue that course of action.

We are unable to agree with this conclusion of the Law Reform Commission of British Columbia. In the opinion of this Commission, the Ontario *Creditors' Relief Act*, even alongside the *Bankruptcy Act*, serves a useful function. To gather information about the operation of the *Creditors' Relief Act*, the Commission carried out a study of distributions thereunder in 1977 by the Sheriff of the Judicial District of York. The Commission examined all distribution lists prepared by the sheriff during that year. Our analysis of these distributions disclosed, for example, that over fifty percent of all distributions involved three or more creditors. Nearly sixty percent of all dividends were paid out in the course of distributions involving four or more creditors. To ensure receipt of some share of a debtor's exigible property, a subordinate creditor in a "first come, first served" regime would be forced to resort to petitioning the debtor into bankruptcy. The Law Reform Commission of British Columbia admitted that repeal of the *Creditors' Relief Act* was likely to result "in some increase in the incidence of bankruptcy proceedings invoked by subordinate creditors who have no other way to enforce the right to equal distribution",[138] a consequence of repeal that the British Columbia Commission apparently was prepared to countenance.

We do not see bankruptcy as a desirable alternative to rateable distribution under a revised *Creditors' Relief Act*. While we agree that the orderly payment of debts scheme proposed by this Commission,[139] and the substantial modifications to Canada's bankruptcy laws now under consid-

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[136] *Supra*, note 21.

[137] British Columbia Report, *supra*, note 55, at 18 (footnote reference omitted).

[138] *Ibid.*, at 13-14.

[139] See Commission Report, *supra*, note 1, Part I, ch. 2.

eration by the Parliament of Canada,[140] would make near-bankruptcy and bankruptcy a somewhat less terrifying alternative, nevertheless, for many, the trauma of bankruptcy will not be minimized or eliminated. Moreover, the bankruptcy option, rather than being less cumbersome and less costly than rateable distribution under a creditors' relief regime, would put into motion the whole bankruptcy machinery at a substantial cost in time and money to both the debtor and his creditors. Even if the Commission's orderly payment of debts scheme were invoked, substantial costs still would be incurred.

Other arguments for and against repeal of the *Creditors' Relief Act* canvassed by the Law Reform Commission of British Columbia included the impact of repeal on litigation and enforcement practices. The Commission could only speculate whether a "first come, first served" regime would foster a "get-in-quick" attitude, or whether a more comprehensive *Creditors' Relief Act* would deter creditors from litigating and enforcing their claims.[141]

As the preceding discussion makes clear, there is much that is wrong with the present Ontario *Creditors' Relief Act*. Unlike the Law Reform Commission of British Columbia, however, we believe that the Act, with certain substantial changes, can continue to play an important role in the law of this Province. In some circumstances, it permits rateable distribution of the proceeds realized from the debtor's exigible assets without resort to the machinery of bankruptcy. In addition, as the British Columbia Report itself suggested, a creditors' relief scheme, if properly designed and efficiently managed, "could eliminate priorities where they are not socially justifiable, and provide a structure within which meritorious claims to priorities are recognized"[142] more readily than a "first come, first served" regime.

Interestingly, just before the proposal by the Law Reform Commission of British Columbia for repeal of that Province's *Creditors' Relief Act*, the "first come, first served" regime in two jurisdictions had come under attack. Both in the United Kingdom and in New South Wales, there has been a call in recent years for the introduction of a *pro rata* scheme of distribution in respect of proceeds of enforcement in place of their existing "first come, first served" regimes.

In the United Kingdom, the *Report of the Committee on the Enforcement of Judgment Debts*[143] recommended that all proceeds of enforcement be distributed rateably among creditors enforcing their judgments at the time the proceeds are received.[144] This proposal, referred to as "fair shares distribution", would be made practicable by requiring all creditors wishing

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[140] See Bill C-12, *supra*, note 21.

[141] British Columbia Report, *supra*, note 55, at 13-14.

[142] *Ibid.*, at 16.

[143] *Report of the Committee on the Enforcement of Judgment Debts* (Cmnd. 3909, 1969) (hereinafter referred to as the "Payne Committee Report").

[144] *Ibid.*, para. 416, at 110.

to employ enforcement measures to undertake that all payments made by, or on behalf of, a judgment debtor would be handed over to the Enforcement Office.[145]

The New South Wales Law Reform Commission, in its 1975 *Draft Proposal Relating to the Enforcement of Money Judgments*, made similar recommendations.[146] We also would note that, in contrast to the recommendation of the Law Reform Commission of British Columbia, the Law Reform Division of the New Brunswick Department of Justice in 1976 advocated the retention and expansion of the New Brunswick *Creditors Relief Act*.[147]

For all the above reasons, we recommend that the Ontario *Creditors' Relief Act* should be retained, but that it should be amended substantially to eliminate the inequities and deficiencies of the present Act.

6. A REVISED *CREDITORS' RELIEF ACT*

Having proposed the retention of the *Creditors' Relief Act* in some amended form, we turn to consider what changes are necessary to give greater effect to the principle of rateable distribution of the proceeds of enforcement and to ensure that those creditors in need of some protection are accorded the appropriate priority. Just as we commenced our consideration of the operation of the present Act by describing the proceeds that are subject to it, we begin this section with a discussion of what proceeds should be comprehended by a revised *Creditors' Relief Act*.

(a) THE SCOPE OF THE REVISED ACT: PROCEEDS OF ENFORCEMENT

(i) General

As a general principle, the Commission knows of no reason why all enforcement proceeds should be distributed in any manner other than in accordance with a revised *Creditors' Relief Act*. In other words, the Act should apply regardless of whether the proceeds are realized from the seizure and sale of the debtor's property, as a result of the garnishment of his debts, or pursuant to a receivership order or stop order.[148] Similarly, the fact that the judgment being enforced is one from the Supreme Court, a county or district court, or a small claims court should be irrelevant. We

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[145] *Ibid.*

[146] See s. 58 of the draft *Money Judgments Enforcement Act, 1975*, proposed by the New South Wales Law Reform Commission in its *Draft Proposal Relating to the Enforcement of Money Judgments* (1975) (hereinafter referred to as the "New South Wales Report").

[147] See New Brunswick Department of Justice, Law Reform Division, *Third Report of the Consumer Protection Project*, Vol. II, *Legal Remedies of the Unsecured Creditor After Judgment* (1976), at 27-35 (hereinafter referred to as the "New Brunswick Report").

[148] Charging orders, discussed *supra*, this ch., sec. 2(c), would be abolished under the Commission's earlier recommendations: see Commission Report, *supra*, note 1, Part II, at 250-56. For the Commission's recommendations concerning the appointment of a receiver for the purpose of enforcing a judgment, see *ibid.*, at 234-41.

deal separately with the question whether proceeds realized as a result of the enforcement of a provincial court (family division) judgment ought to be subject to rateable distribution.[149]

The Commission has considered the argument that a *Creditors' Relief Act* of general application might discourage certain creditors, for example, small claims court creditors, from initiating and pursuing claims against their debtors because of the necessity of sharing any proceeds realized with other creditors. This point was made by the Law Reform Commission of British Columbia in its 1979 *Report on Creditors' Relief Legislation: A New Approach*.[150] We do not believe, however, that a requirement to share proceeds of enforcement would deter the initiation of actions in the small claims courts. Since the upper limit of the monetary jurisdiction of the small claims courts is now $1000,[151] actions in the small claims courts will not always involve minor amounts. It also should be pointed out that the small claims courts are far from the exclusive domain of small creditors; indeed, many large corporations commonly rely on these courts for the collection of outstanding debts.

With respect to the enforcement of small claims courts judgments, in most cases the costs of enforcement proceedings are inconsequential and are unlikely to discourage the commencement of enforcement activity against a debtor. Furthermore, as the Law Reform Commission of British Columbia itself stated, legislation ensuring that a successful enforcement creditor receives adequate compensation for the costs of enforcement would weaken considerably the "disincentive to enforcement" argument in respect of a creditors' relief regime.[152]

On balance, we are of the view that the risks of a comprehensive *Creditors' Relief Act* for small claims creditors are minimal and the benefits substantial; the concomitant of the obligation to share proceeds of enforcement would be the right to receive a share of the proceeds realized by other creditors. We shall deal with this issue later in this chapter.

Although a proposal to make all enforcement proceeds subject to rateable distribution pursuant to a revised *Creditors' Relief Act* would be a substantial departure from the present law, the Commission already has made a number of recommendations that lead almost inexorably to this conclusion. For example, in chapter 3 of Part I of the *Report on the Enforcement of Judgment Debts and Related Matters*, the Commission recommended the establishment of a reorganized enforcement office that would be responsible for the enforcement of judgments from all court levels, including the small claims courts and the provincial courts (family

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[149] See *infra*, this ch., sec. 6(a)(ii).

[150] British Columbia Report, *supra*, note 55, at 12 and 17.

[151] See the *Small Claims Courts Act*, *supra*, note 25, s. 55. It should be noted that the monetary jurisdiction of the small claims courts in the Municipality of Metropolitan Toronto has been increased to $3000: see the *Provincial Court (Civil Division) Project Act*, R.S.O. 1980, c. 397, s. 6, as amended by the *Provincial Court (Civil Division) Project Amendment Act, 1982*, S.O. 1982, c. 58.

[152] British Columbia Report, *supra*, note 55, at 15 and 17.

division).[153] Furthermore, the Commission proposed the centralization of virtually all enforcement measures in the new enforcement office, including the garnishment of debts, receivership, and stop orders. Consequently, it would be difficult from an administrative point of view for an enforcement office with such a mandate to bifurcate its enforcement activities depending upon the courts from which the judgments being enforced emanated. Some scheme of distribution would have to be invented to allow the enforcement office to allocate the proceeds of enforcement in such circumstances.

Insofar as the proceeds of specific enforcement remedies are concerned, given the fact that, under our earlier recommendations, the enforcement office generally would be responsible for garnishment, it no longer seems to make any sense to make only some garnishment proceeds, but not others, subject to a revised *Creditors' Relief Act*, as is now the case under the *Creditors' Relief Act*.[154] As indicated earlier, while all garnishment proceeds are, theoretically, required to be distributed rateably under the Act, proceeds of garnishment issued out of the small claims courts and the provincial courts (family division) are not, in practice, subject to the Act.[155] The reason for this state of affairs is the fact that a sheriff generally is not in a position to know whether there are garnishment proceeds in the hands of a clerk of the small claims court or a clerk of the provincial court (family division) and, consequently, cannot make use of section 4(6) and (8) of the *Creditors' Relief Act*. Under our recommendations respecting garnishment, this would no longer be a problem, as all proceeds of garnishment, except family court wage garnishment, would be paid to the new enforcement office.

With respect to execution against real and personal property, under the Commission's recommendations for the centralization of enforcement activities in the new enforcement office, all writs of enforcement, even those issuing from small claims courts, would be executed by the new office.[156] There would be no administrative need to differentiate between proceeds of enforcement realized pursuant to a small claims court execution and those secured under a writ of enforcement from the Supreme Court or a county or district court. Accordingly, the sheriff's theoretical right, discussed above, to claim proceeds in the hands of a bailiff under section 25 of the present *Creditors' Relief Act* and to distribute them under the Act would no longer be necessary: the proceeds would be in the hands of the new enforcement office *ab initio*.

With respect to money realized as a result of receivership and stop order proceedings, again, under the Commission's earlier proposals, this money would be paid to the new enforcement office as a matter of course.

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[153] See Commission Report, *supra*, note 1, Part I, at 109-18. However, the new enforcement office would not be responsible for family court wage garnishment and show cause proceedings; these would continue to be the responsibility of family court officials: see *ibid.*, at 87-96.

[154] For the Commission's recommendations respecting garnishment, see Commission Report, *supra*, note 1, Part II, ch. 3.

[155] See discussion *supra*, this ch., secs. 2(b)(ii) and (iii).

[156] See Commission Report, *supra*, note 1, Part I, at 5 and 78-79.

Accordingly, the Commission recommends that, with the exception of proceeds of family court enforcement, all proceeds realized as a result of enforcement activity should be distributed in accordance with the revised *Creditors' Relief Act*, irrespective of the method of enforcement employed and regardless of whether the judgment being enforced emanated from the Supreme Court, a county or district court, or a small claims court.

Because of the present, narrow interpretation given to the term "money levied" found in section 5(1) of the present *Creditors' Relief Act*, a further recommendation is necessary, lest the words contained in the above recommendation, "proceeds realized as a result of enforcement activity", be interpreted restrictively. There is case law to the effect that, although there need not be a sale of property seized under a writ of execution in order for there to be a "levy" within the meaning of section 5(1), property transferred and money paid to the sheriff must have been transferred or paid as a consequence of a seizure before it can be said to have been levied.[157] Money paid under a threat of seizure has been held not to be "money levied".[158] And it matters not whether, in such a case, the money is paid to the sheriff by the judgment debtor or by a third person on behalf of the debtor. We find this to be an entirely unsatisfactory state of affairs.

In the view of the Commission, the distinction that has been drawn in the cases between funds received as a result of an actual seizure and those received as a result of a threatened seizure is an artificial one. In each case, the enforcement office would be called upon to take active measures to enforce a judgment; the money paid would be paid to an official of the enforcement office acting in that capacity; and the payment would be made as a direct result of enforcement activity. We do not believe that, before money should be subject to rateable distribution, the sheriff should be required to go to the lengths of actually seizing the debtor's property – incurring certain costs as a result – when the threat of seizure might be just as effective. Accordingly, we recommend that all payments made to the sheriff either by the judgment debtor or by a third person on his behalf, once enforcement proceedings have been initiated against the debtor, should be distributed in accordance with a revised *Creditors' Relief Act*.

It should be noted that this recommendation resembles proposals made by the Law Reform Commission of British Columbia in its 1976 *Working Paper No. 21, The Enforcement of Judgment Debts: The Creditors' Relief Act*. In this Working Paper, which preceded the Commission's final Report, the British Columbia Commission outlined the changes that would have to be made to the British Columbia *Creditors' Relief Act* to

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[157] See *Reid v. Gowans* (1886), 13 O.A.R. 501, at 520, and *Benjamin Moore & Co. Ltd. v. Finnie*, [1954] O.W.N. 772, [1955] 1 D.L.R. 557 (Co. Ct.). See, also, *Trust and Loan Co. v. Cook* (1910), 3 S.L.R. 210, 14 W.W.R. 727 (C.A.), and *Badiuk v. Moore*, [1930] 1 D.L.R. 47, [1929] 3 W.W.R. 115 (Alta. Dist. Ct.). See, also, Dunlop, *supra*, note 4, at 423-26.

[158] See *Benjamin Moore & Co. Ltd. v. Finnie*, *supra*, note 157. Compare *In re Young v. Ward* (1896), 27 O.R. 588 (H.C.J.), and *Re Koppers Co. Inc. and Dominion Foundries & Steel Ltd.* (1965), 52 D.L.R. (2d) 36, 8 C.B.R. (N.S.) 49 (Man. C.A.).

create an "ideal" Act. The following amendment to the British Columbia Act was suggested:[159]

> The *Creditors' Relief Act* be amended so as to include within its scope:
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> (i) any payment made to a sheriff by a debtor after a writ of execution has been issued.
>
> (ii) any payment made to a sheriff in respect of a judgment by any other person who was induced to do so by the existence of a writ of execution.

The final question concerning the scope of a revised *Creditors' Relief Act* is whether the judgment debtor, by making private payments to his judgment creditors, should be free to bypass the scheme of priorities established in a new *Creditors' Relief Act*. This particular issue has received the attention of the Law Reform Commission of British Columbia, the English Committee on the Enforcement of Judgment Debts, and the New South Wales Law Reform Commission, the latter two bodies having advocated a creditors' relief type of regime.

The 1969 Payne Committee Report contained the following comments on this subject:[160]

> 416. It is an essential part of the machinery of the Enforcement Office that all monies paid by, or recovered from, the judgment debtor after an enforcement order has been made against him, or otherwise obtained in the course of enforcement, should be paid into, or accounted for, to the Enforcement Office. Unless such monies are dealt with by the Enforcement Office it would not be possible for it to control the course of the enforcement or to distribute the proceeds among several judgment creditors pro rata according to the priorities (if any) which are attached to their respective debts. We fully appreciate that in many instances judgment debtors and judgment creditors may wish to negotiate directly with each other and we would not wish to disturb any such negotiations. Nevertheless, we think it is necessary that machinery be provided to ensure that all payments made by, or on behalf of, a judgment debtor to a judgment creditor or his agent should either be paid into, or accounted for, to the Enforcement Office. Such machinery is also necessary to enable the Enforcement Office to deduct or to recover the prescribed fees for the enforcement proceedings. . . .
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> 417. In every application the creditor should undertake to pay all monies received from or on behalf of the debtor into the Enforcement Office. At the time of making the enforcement order the Enforcement Office should also make an order on the debtor not to pay to the creditor or creditors any money towards the satisfaction of the judgment debt except through the Enforcement Office.

These sentiments were echoed in the 1975 *Draft Proposal Relating to the Enforcement of Money Judgments* prepared by the New South Wales Law Reform Commission.[161]

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[159] British Columbia Working Paper No. 21, *supra*, note 122, at 39.

[160] Payne Committee Report, *supra*, note 143, at 110.

[161] See New South Wales Report, *supra*, note 146, at 39.

Interestingly, the Law Reform Commission of British Columbia did not share this view, although British Columbia has had a creditors' relief scheme in force since 1902. In its 1979 Report, the Law Reform Commission of British Columbia noted as one of the likely consequences of an "ideal" *Creditors' Relief Act* the following:[162]

> An 'ideal' Creditors' Relief Act might encompass payments made directly by the debtor to the creditor who has initiated enforcement proceedings. Such a creditor could be compelled to remit that payment to the sheriff for distribution to all creditors who qualify under the Act. But very often such a payment is made in return for a 'release' by the creditor of the particular property which had been charged or bound by the execution. It is our belief that a Creditors' Relief Act expanded in this way would have a significant effect on the willingness of creditors to enter into such arrangements.

While, ideally, it would be most equitable to adopt the approach espoused in the Payne Committee Report and the New South Wales *Draft Proposal Relating to the Enforcement of Money Judgments*, the Commission finds itself in agreement with the conclusion drawn by the British Columbia Commission. In our view, the negative impact of such a proposal on the willingness of creditors to enter into negotiated settlements would prove more detrimental to the enforcement of judgment debts than the benefit to be gained from prohibiting private payments and requiring any such payments to be turned over to the enforcement office for distribution under a revised *Creditors' Relief Act*. Accordingly, we recommend that private payments to a creditor by a debtor or a third party on the debtor's behalf should not be proscribed by the revised Act.

At the same time, we do not wish to appear to be encouraging creditors to look to the publicly funded enforcement office for the enforcement of judgment debts, while thumbing their noses at the public policy embodied in a revised *Creditors' Relief Act*. We should point out that a judgment debtor may not always be free to make such private payments, nor a creditor to receive them, without legal repercussions. For example, a payment by a judgment debtor to one of his judgment creditors may well run afoul of the Commission's proposed voidable transactions legislation.[163] Consequently, another judgment creditor may be in a position to institute legal proceedings to impeach the payment and trace it into the hands of the preferred judgment creditor. In addition, the Commission will propose below that every creditor entitled to receive a share of a distribution made pursuant to the revised Act should be under a legal obligation to advise the enforcement office of the precise status of his judgment debt.[164] Failure to do so would subject the creditor to a fine, which in turn would be distributed among the debtor's other judgment creditors.[165]

While these two measures may not result in the establishment of an "ideal" *Creditors' Relief Act*, we believe that, if enacted, they would result

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[162] British Columbia Report, *supra*, note 55, at 12.

[163] See ch. 3 of Part IV of the Commission's *Report on the Enforcement of Judgment Debts and Related Matters*, *supra*, note 120.

[164] See *infra*, this ch., sec. 6(g).

[165] *Ibid.*

in a satisfactory compromise. The debtor and his creditors would remain free to reach mutually satisfactory accommodations regarding the payment of the debtor's judgment debts, while, at the same time, the possible prejudice to any one of the debtor's judgment creditors that might be occasioned thereby would be reduced to the practical minimum.

(ii) Proceeds of Provincial Court (Family Division) Enforcement

In chapter 3 of Part I of its *Report on the Enforcement of Judgment Debts and Related Matters*, the Commission considered whether the proposed enforcement office should be responsible for the enforcement of judgments emanating from the provincial courts (family division). The Commission concluded as follows:[166]

> As a general principle, the Commission is of the view that separate family court enforcement, distinct from the proposed new enforcement office, would be administratively cumbersome and redundant as well as conceptually unsound. There is no more reason for having separate personnel in the family court responsible for the mechanics of enforcing support orders than there is for having separate enforcement officers responsible for enforcing Supreme Court, county and district court and small claims court judgment debts. The issue concerning which body should have jurisdiction to issue the proposed new writ of enforcement should be kept separate from the issue concerning which body is best equipped to enforce the writ. Integration of the enforcement of support orders into the new system that we have proposed would obviate the constant delays, innumerable telephone calls and substantial paper work inherent in a bifurcated enforcement system. Moreover, along with the integration of small claims court enforcement recommended earlier, the integration of family court enforcement finally would bring almost all enforcement activities under one administrative umbrella. Accordingly, we recommend that, except with respect to 'show cause' proceedings and enforcement against a maintenance debtor's wages, the new enforcement office should have exclusive jurisdiction to enforce, by any means, support orders either made by the family court or made by another court and now enforceable through the family court.

The bases for the exceptions in respect of family court wage garnishment and show cause proceedings were three in number. First, the Commission was of the view that these two remedies were intimately related and, in essence, formed "a single, cohesive enforcement mechanism".[167] Secondly, it was the opinion of the Commission that maintaining family court wage garnishment and the show cause procedure available under the *Family Law Reform Act* in the provincial courts (family division) was essential to the "efficiency and effectiveness of the 'automatic enforcement system' ".[168] Finally, the Commission noted the close relationship between family court creditors and the family court, and the general trust reposed by family court creditors in the family court, and expressed the view that this important relationship would be jeopardized if the two remedies

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[166] Commission Report, *supra*, note 1, Part I, at 89.

[167] *Ibid.*, at 91.

[168] *Ibid.*, at 92.

under discussion were taken out of the family court and put under the auspices of the proposed new enforcement office.[169]

In light of the Commission's earlier proposals concerning responsibility for the enforcement of provincial court (family division) judgments, it has been necessary to deal with the question whether the proceeds realized as a result of enforcement measures taken with respect to such judgments should be required to be shared with other creditors of a maintenance debtor. Later in this chapter, and for reasons there discussed, the Commission will recommend that maintenance creditors should have a priority in respect of any proceeds of enforcement realized as a result of enforcement measures taken against a maintenance debtor.[170] Implicit in this recommendation is a decision that proceeds of enforcement activity for which the maintenance creditor is responsible should not be required to be distributed pursuant to the proposed revised *Creditors' Relief Act*, whether the enforcement measures adopted are those for which the provincial court (family division) would be responsible or those that would come under the aegis of the enforcement office under our earlier recommendations. We so recommend.

We should point out that our recommendation that the proceeds of enforcement activity for which a maintenance creditor is responsible should not be subject to rateable distribution under the revised *Creditors' Relief Act* would constitute a major change; it would appear that, at the present time, maintenance creditors enjoy no such exclusive rights to the fruits of their enforcement labours, except in the case of the present attachment of wages remedy available under section 30 of the *Family Law Reform Act*.[171] However, for the same reasons that in our view justify the maintenance creditor's priority recommended below, we believe that this approach is a sound one.

With respect to proceeds realized as a result of enforcement measures for which the enforcement office is responsible, because all proceeds realized pursuant to such measures will go to satisfy the judgment or order of the maintenance creditor in any event, we believe that the enforcement office should act simply as a conduit and pass the moneys on to the appropriate provincial court (family division), to be paid in turn to the maintenance creditor. Given the enforcement office's responsibillty for securing such funds, we believe that it makes administrative sense to have the proceeds pass through the enforcement office in order that that office can make the necessary bookkeeping entries. Moreover, it seems administratively desirable that the enforcement office not divide its enforcement activities; when it acts, it should do so on behalf of all creditors who have filed a writ of enforcement with the enforcement office.

(b) The Scope of the Revised Act: Entitlement to Share

As discussed previously in this chapter, the present *Creditors' Relief Act* is not comprehensive with respect to the types of judgment creditor

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[169] *Ibid.*, at 93-94.

[170] See *infra*, this ch., sec. 6(c)(i).

[171] See discussion *supra*, this ch., sec. 4(b)(ii)a.

entitled to share in a distribution under the Act. For example, while it is clear that creditors by execution from the Supreme Court, county and district courts and, in some cases, the small claims courts, are entitled to share rateably in the proceeds of enforcement now required to be distributed in accordance with the Act, the right of creditors by execution from the provincial courts (family division) so to share is questionable. In the case of creditors responsible for the garnishment of money owing to the judgment debtor by third persons, the Act provides only a limited right to participate in a distribution under the Act.[172] The position of other judgment creditors, such as those who have resorted to equitable execution, charging orders, or stop orders is, as we have discussed earlier, far from clear under the present Act.

While the right of certain judgment creditors to share under the *Creditors' Relief Act* is unclear or absent, the Act does afford non-judgment creditors a right to share in proceeds of enforcement in certain limited circumstances by using the certificate procedure under the Act. In this section, we shall examine three matters: first, whether non-judgment creditors should continue to be entitled to partake in the distribution of enforcement proceeds; secondly, whether all judgment creditors should be covered by the Act; and thirdly, the time at which entitlement to share should be determined.

(i) Non-Judgment Creditors

The argument in favour of the certificate procedure is based on economics. It is contended, for example, that the certificate procedure found in the Act discourages a "get-in-quick" attitude on the part of creditors. If non-judgment creditors are able to share in the distribution of enforcement proceeds, they are more likely to be willing to afford their debtors an opportunity to meet his financial obligations without resort to legal process. The absence of any need to institute legal proceedings without delay against the debtor means that both the debtor and his creditors will be able to save the cost of what otherwise could be a "rush to judgment". This savings may well help the debtor to set his financial house in order.

Another argument in favour of the present certificate procedure is that it helps to eliminate purely fortuitous results. For example, the debtor's creditors may have limited control over how quickly proceedings against their debtor are determined. Because of circumstances over which the creditors have no control, an action in one court may be resolved more speedily than one in another court: the trial list in one county may be much longer than in another and, in the case of the Supreme Court of Ontario, litigants in some cases must wait a considerable time for the arrival of the circuit judge.

While the above arguments are not without merit, the Commission believes that there are strong countervailing reasons for the abolition of

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[172] *Creditors' Relief Act*, *supra*, note 2, s. 4(6).

the present certificate procedure. First and foremost, the Commission is of the view that, on principle, it ought not to sanction a scheme of distribution that allows non-judgment creditors to take advantage of the sometimes costly and time-consuming efforts of judgment creditors responsible for the realization of enforcement proceeds. While it may be "unfair" to require non-judgment creditors to proceed to judgment in all cases before being entitled to claim a share of their debtor's assets, it is equally "unfair" to force a judgment creditor to share the fruits of his labours with those who are more than happy to let someone else incur the expense of securing a judgment and enforcing it against the debtor. This "coattails" feature of the *Creditors' Relief Act* has been criticized severely by members of the legal profession.

We would also suggest that the cost savings argument, set out above, may not be entirely accurate. While it may be true to say that a certificate procedure may obviate the need for some creditors to institute full scale legal proceedings against their debtors, legal proceedings may not be eliminated entirely. They may simply take on a different form, and substantial costs still will be incurred. This will be true where the debtor or a judgment creditor contests the non-judgment creditor's claim and resort must be had to the dispute resolution procedures found in the *Creditors' Relief Act*.[173]

The Commission has concluded that the limited right of non-judgment creditors to participate in a distribution of enforcement proceeds prescribed at present by the *Creditors' Relief Act*, while of theoretical significance, is of little practical importance. Although the elimination of the certificate procedure that now forms a part of Ontario's creditors' relief legislation may be seen as a radical step, in our view, abolition of the certificate procedure is likely to have little negative impact on enforcement practices. We have arrived at this conclusion for two main reasons. First, we would point out that the right of non-judgment creditors to share in distributions under the Act at the present time is severely restricted. Only in those circumstances outlined in section 6 of the *Creditors' Relief Act* may a non-judgment creditor resort to the certificate procedure.[174] Moreover, even if the circumstances described in section 6 exist, it still may be very difficult for a non-judgment creditor to meet all the procedural requirements to become entitled to share in a distribution of proceeds under section 5(2) of the Act.[175]

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[173] *Ibid.*, ss. 12-14.

[174] Section 6 reads as follows:

> 6.-(1) If a debtor permits an execution issued against him under which any of his goods or chattels are seized by a sheriff to remain unsatisfied in the sheriff's hands until within two days of the time fixed by the sheriff for the sale thereof, or for twenty days after the seizure, or allows an execution against his lands to remain unsatisfied for nine months after it has been placed in the sheriff's hands, the proceedings hereinafter authorized may be taken by other creditors or claimants in respect of debts that are overdue.
>
> (2) When a sale has taken place under an execution, the proceedings hereinafter authorized may be taken by any creditor of the execution debtor even though his claim is not then due.

[175] The certificate procedure is described in detail *supra*, this ch., sec. 3(b).

The second ground for our conclusion that abolition of the certificate procedure is unlikely to have an adverse effect on enforcement practices is the fact that, from the evidence available to the Commission, the procedure is resorted to only rarely in any event. For example, of the dividends paid out pursuant to the *Creditors' Relief Act* in 1977 by the Sheriff of the Judicial District of York, approximately one-tenth of one percent went to certificate creditors.

This paucity of certificate creditors may be attributable to the practising Bar's unawareness of the certificate procedure and the unwieldy nature of the present procedure. It may be argued, therefore, that what is needed is not the elimination of the certificate procedure, but a heightened awareness of its availability and improvement of the procedure. The Commission, however, does not believe that greater reliance on the certificate procedure can be realized without increased administrative complexity and without further jeopardizing the position of judgment creditors. Any benefits that might be secured by "improving" the certificate procedure would be offset, in our opinion, by the adverse consequences to a revised creditors' relief regime that would be occasioned by such an "improvement". Therefore, the Commission recommends that, generally speaking, non-judgment creditors should not have a right to share rateably in the distribution of enforcement proceeds under the revised *Creditors' Relief Act*, and that, accordingly, the present certificate procedure should not be included in the revised Act.

Notwithstanding the proposed abolition of the certificate procedure, the Commission believes that, in three cases, non-judgment creditors should be entitled to share in a distribution of proceeds under the revised Act. We think that an exception must be made, first, in the case of non-judgment creditors who have proved their claim against the debtor in the context of an arrangement made under the proposed orderly payment of debts scheme that subsequently has been annulled;[176] secondly, in the case of creditors who attach property of debtors prior to judgment; and thirdly, in the case of non-judgment creditors who are responsible for impeaching a voidable transaction.

In chapter 2 of Part I of the Commission's *Report on the Enforcement of Judgment Debts and Related Matters*, we discussed in considerable detail the operation of an orderly payment of debts scheme along the lines of Part III of the proposed new *Bankruptcy Act*.[177] One of the subjects expressly dealt with by the Commission at that time was the kinds of claim that should be admissible where the debtor proposes to make an orderly payment of debts arrangement. While we did not recommend that a creditor with unliquidated or contingent debts or claims should be allowed to prove his claim and participate in a proposed arrangement, we were of the opinion that a creditor with a debt payable immediately or at a future time, whether liquidated, certain, secured, or unsecured, should be able to do so.[178] In order to participate in an arrangement, a non-judgment cred-

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[176] See Commission Report, *supra*, note 1, Part I, at 41-44.

[177] Bill C-12, *supra*, note 21.

[178] See Commission Report, *supra*, note 1, Part I, at 23-27.

itor would have to satisfy the Administrator of the validity of his claim.[179] Where, for whatever reason, the arrangement must be annulled, we can see no justification in then requiring the non-judgment creditor to proceed to judgment in order to share in any distribution under a revised *Creditors' Relief Act*. In our opinion, the validation of the creditor's claim under an arrangment should be the equivalent of a judgment for the purposes of the new Act.

We have come to this conclusion for the following reasons. First, given the fact that the creditor's claim may have been contested by the debtor's other creditors, and will have been examined and approved by the Administrator, whose decision will be subject to appeal, there would seem to be little danger in permitting the non-judgment creditor to share in a distribution under a revised *Creditors' Relief Act*. In essence, there would be little to distinguish such a non-judgment creditor from a creditor who has proceeded to judgment in the usual way. To require a non-judgment creditor whose claim has been validated in the course of an orderly payment of debts arrangement to proceed to judgment once the arrangement has been annulled would be to ask the creditor and his debtor to incur what, in our view, would be a needless expense.

Secondly, it must be remembered that a creditor whose claim is subsumed in an arrangement will be subject to a stay of proceedings imposed with respect to all actions and activities concerning the collection of debts from the applicant debtor.[180] Creditors with unliquidated or contingent claims, on the other hand, will be free to continue legal proceedings against the debtor.[181] Therefore, a non-judgment creditor with an admissible claim could be in a less advantageous position than creditors not comprehended by the arrangement in respect of the enforcement of his claim if, after the annulment of an arrangement, he were required to obtain judgment against the debtor in order to share in any *Creditors' Relief Act* distribution. In the view of the Commission, such a result would be unfair to those non-judgment creditors who would be comprehended by an arrangement and should not be countenanced. Therefore, we recommend that a non-judgment creditor whose claim has been approved under an orderly payment of debts arrangement that has been annulled should be entitled to share *pro rata* in a distribution of proceeds under the revised *Creditors' Relief Act*.

Turning to the second exception to our recommendation that non-judgment creditors not be permitted to participate in distributions under the revised *Creditors' Relief Act* – concerning a creditor who attaches property of his debtor prior to judgment – the Commission, in chapter 2 of Part IV of its *Report on the Enforcement of Judgment Debts and Related Matters*, recommended sweeping changes to the law of provisional or pre-judgment relief. We there proposed that a creditor should be able to attach his debtor's property before judgment in certain circumstances. The

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[179] *Ibid.*

[180] *Ibid.*, at 34-36.

[181] *Ibid.*, at 23-27.

abolition of the certificate procedure available under the present *Creditors' Relief Act* could have serious implications for non-judgment creditors employing the new attachment remedy. If a debtor's judgment creditors were able to take the property attached before judgment in satisfaction of their judgments against the debtor, and if at the same time the attaching creditor were not allowed to share in the proceeds realized therefrom until he too had obtained judgment, the attaching creditor might well incur substantial expense without benefit.

We do not believe that the creditors entitled to share in a distribution under the *Creditors' Relief Act* should benefit at the attaching creditor's expense.[182] Accordingly, we recommend that, as an exception to the general scheme of a revised *Creditors' Relief Act*, an attaching creditor should be entitled to share *pro rata* in the proceeds realized from property that he has had attached.

Since, then, an attaching creditor would be entitled to share in a distribution under the Act, what mechanism ought to be adopted to give effect to this right? Several alternatives are open. The sheriff could be required to hold all proceeds from the sale of the attached property until the plaintiff obtains judgment. This alternative, however, has the disadvantage of potentially tying up for a long period the proceeds of the sale of what may be the debtor's only exigible asset. Consequently, all creditors would be delayed. A second alternative would be to require the sheriff to hold back the attaching creditor's anticipated *pro rata* share of the proceeds. If the final judgment was for a lesser amount, a further distribution to the other creditors could be made. However, in some cases – for example, where the non-judgment creditor's main action is for defamation – it might be very difficult to estimate the amount to be held back. A third alternative would be to establish a summary method of determining the amount of the plaintiff's claim, utilizing a mechanism akin to the one for certificate creditors now found in the *Creditors' Relief Act*.[183]

On balance, the Commission has concluded that specific legislation setting forth the precise mechanism to be followed in permitting a successful non-judgment creditor to reap the benefits of his attachment would be unduly rigid, and likely unnecessary. Accordingly, we recommend that the court, upon application, should determine the manner in which an attaching creditor should share, having regard to all relevant circumstances, including the nature of the non-judgment creditor's claim, and the time before judgment in the main action likely will be given. Of course, the attaching creditor's share, in such a case, should not be distributed to him before judgment; distribution should await a judgment in the attaching creditor's favour. If the attaching creditor is ultimately unsuccessful in the action against the debtor, his share should be distributed *pro rata* to the judgment creditors required to share with the attaching creditor.

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[182] Later in this chapter we also recommend that an attaching creditor should be provided with protection in respect of the costs incurred in having the debtor's property attached: see *infra*, this ch., sec. 6(f)(ii).

[183] See discussion *supra*, this ch., sec. 3(b).

Finally, we turn to the position of persons responsible for impeaching voidable transactions. In chapter 3 of Part IV of this Report, the Commission recommended that creditors should continue to be able to impeach certain voidable transactions by their debtors – transactions now known as fraudulent conveyances and fraudulent preferences. In light of our proposal to abolish the certificate procedure available under Ontario's present creditors' relief legislation, to give standing to a non-judgment creditor to impeach such transactions could be a rather empty gesture. For example, the creditor's main action against the debtor might not be completed until after judgment has been given in the fraudulent conveyance or fraudulent preference action, with the result that he would not be entitled to a writ of enforcement. Where there are other creditors of the debtor who have writs filed with the sheriff, only they would have an opportunity to receive a share of the proceeds obtained from a sale of the property in dispute in such an action. The non-judgment creditor's successful impeachment of the conveyance or preference would enure to the benefit of the other creditors alone.

The Commission believes that there is a strong argument that a non-judgment creditor who successfully impeaches a voidable transaction should be entitled to share in any distribution of the proceeds realized as a result of the action, and we so recommend.[184] The creditor, after all, has taken the initiative and assumed certain risks in commencing his action, to the benefit of all creditors. With respect to the manner of sharing, as in the case of an attaching creditor, we recommend that, where the successful plaintiff in a fraudulent conveyance or fraudulent preference action is a non-judgment creditor, the court, upon application, should determine the manner in which the plaintiff should share in any distribution of enforcement proceeds arising as a result, having regard to all relevant circumstances, including the nature of the plaintiff's claim and the time before judgment in the main action likely will be given. Of course, the right to receive his share would be contingent upon the creditor obtaining judgment against the debtor.

(ii) Judgment Creditors

We turn now to the question whether all judgment creditors who have taken enforcement measures against their judgment debtors should be entitled to share in the distribution of enforcement proceeds under the new Act, irrespective of the type of remedy employed by them. At the present time, when all enforcement activity is not centred in the sheriff's office, and when not all enforcement proceeds are subject to the *Creditors' Relief Act*, it may be logical to provide that only certain judgment creditors should be entitled to share rateably in the proceeds subject to the Act. While we would challenge even this assertion, the Commission is of the opinion that the centralization of virtually all enforcement activity in the new enforcement office recommended by the Commission[185] must change this picture substantially.

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[184] Later in this chapter, we also recommend that a non-judgment creditor who brings a successful voidable transaction suit should be provided with protection in respect of the costs incurred in such proceedings: see *infra*, this ch., sec. 6(f)(ii).

[185] See Commission Report, *supra*, note 1, Part I, at 109-15.

Under the Commission's proposals, enforcement of a judgment debt would be initiated by filing the proposed writ of enforcement in the enforcement office. Execution and, with the exception of family court wage garnishment, garnishment would be under the auspices of the new enforcement office, as would receivership and stop orders. Consequently, at any given time, the enforcement office would be in a position to ascertain all judgment creditors who have instituted enforcement proceedings against a particular debtor. Under such a regime, there would seem to be no reason to limit the right of participation of any enforcement creditor in a distribution under a revised *Creditors' Relief Act*.

With respect to maintenance creditors, although we are of the view that these creditors should not be required to share the proceeds of enforcement for which they are responsible, we do believe that they should be entitled to share in a distribution of enforcement proceeds that have been secured as a result of the efforts of other non-maintenance creditors. Indeed, as we pointed out above and as we shall explain below, the Commission favours a priority for maintenance creditors in respect of all such proceeds.

Therefore, subject to the matter discussed in the section immediately following, we recommend that all creditors who deliver a writ of enforcement to the new enforcement office should be entitled to share in any distribution of enforcement proceeds made pursuant to the revised Act, regardless of the method of enforcement employed.

(iii) Time at which Entitlement to Share Determined

The preceding discussion has focused upon the creditors who should be entitled to share in proceeds of enforcement distributed under the revised *Creditors' Relief Act*. We now turn to a discrete issue, namely, at what time should the creditors entitled to share in a particular distribution be determined.

It will be remembered that, under section 5(2) of the *Creditors' Relief Act*, "all execution creditors and other creditors whose executions or certificates . . . were in the sheriff's hands at the time of the levy or receipt of the money or who deliver their executions or certificates to the sheriff within one month from the entry", prescribed by section 5(1) of the Act, are entitled to share in such money. Having proposed the elimination of the certificate procedure now available under the Act, we must consider whether, under a revised *Creditors' Relief Act*, an enforcement creditor should have any right to share in proceeds of enforcement realized prior to the filing of his writ of enforcement.

It should be noted that existing creditors' relief legislation in Canada invariably provides some grace period within which subsequent enforcement creditors may assert a claim to money already levied or received.[186]

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[186] The waiting period varies from 14 days in the case of the Alberta *Execution Creditors Act*, R.S.A. 1980, c. E-14, s. 10, to 2 months in the case of the Saskatchewan *Creditors' Relief Act*, R.S.S. 1978, c. C-46, s. 6. This issue was examined in the New

At the same time, all existing creditors' relief legislation enables non-judgment creditors to share in proceeds of enforcement, thereby necessitating the establishment of some grace period in any event.

Consequently, it may be useful to look at the proposals in this regard contained in the Payne Committee Report and the New South Wales Report.[187] As was pointed out earlier, both reports advocated the creation of a creditors' relief type of distribution scheme. Moreover, neither proposed that non-judgment creditors should have any right to share in the proceeds of enforcement. Therefore, it is instructive to note that neither the Payne Committee Report nor the New South Wales Report saw the need to allow subsequent enforcement creditors – that is to say, those creditors filing or registering their judgments after the realization of enforcement proceeds – to share in such proceeds.

While it may be argued that the elimination of the one month grace period now enjoyed by subsequent enforcement creditors would foster a "get-in-quick" attitude among a debtor's creditors, it is the view of the Commission that the abolition of the period of grace now enjoyed by enforcement creditors under section 5(2) of the *Creditors' Relief Act* would have little or no impact on litigation and enforcement practices. In most instances, the existing one month period would not be sufficient time within which to rush to judgment, whether or not legal proceedings have been commenced at the time enforcement proceeds are realized. Existing practices confirm that subsequent enforcement creditors do not become entitled to share as a result of conscious efforts; their right to share is fortuitous rather than planned, and one that seldom is realized.[188] Consequently, the Commission recommends that only those creditors who have

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Brunswick Report, and a forty-five day waiting period has been proposed: see New Brunswick Report, *supra*, note 147, at 320. It should be noted that the forty-five day period would begin to run from the time a decision is made respecting the method of enforcement to be used, rather than from the time money is realized.

[187] See Payne Committee Report, *supra*, note 143, and New South Wales Report, *supra*, note 146, discussed *supra*, this ch., sec. 5.

[188] It would appear that creditors or their advisors automatically file a writ of execution as soon as possible after judgment in their favour has been pronounced. There would seem to be little use made of s. 30 of the *Creditors' Relief Act*, *supra*, note 2, which allows a person to learn from the sheriff the amount of enforcement proceeds in his hands at any given time. Section 30 states as follows:

> 30. Pending the distribution, the sheriff shall keep, in the book mentioned in section 5, a statement in Form 6 showing,
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> (*a*) the amounts levied or received and the dates of levy or receipt;
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> (*b*) each execution, certificate or order in his hands at the time of making the entry in Form 1, or subsequently received during the month, the amount thereof, for debt and costs, and the date of receipt, and such statement shall be amended from time to time as additional amounts are levied or received or further executions, certificates or orders are received.

Our study of the operation of the *Creditors' Relief Act* in 1977 in the Judicial District of York disclosed that the vast majority of those who received dividends were entitled to share in the proceeds because their writs of execution were on file with the sheriff at the time that the proceeds were received.

delivered a writ of enforcement to the enforcement office by the time proceeds of enforcement are realized should be entitled to share therein. This recommendation would have the virtue of further simplifying Ontario's creditors' relief legislation, while doing little injustice to subsequent enforcement creditors.

(c) PRIORITIES UNDER THE REVISED *CREDITORS' RELIEF ACT*

Although the Commission favours retention of a modified *Creditors' Relief Act*, which would continue to embody the principle of rateable distribution of enforcement proceeds among a debtor's enforcement creditors, we do believe that any new creditors' relief legislation also ought to give express recognition to certain competing policies. In this section, we shall consider what priorities should receive legislative sanction in a revised *Creditors' Relief Act.*

(i) The Maintenance Creditor's Priority

Earlier in this chapter,[189] we discussed briefly the extent to which maintenance creditors now are afforded priority under the law. It was pointed out that the only priority enjoyed by maintenance creditors under the present law is with respect to the proceeds of an attachment of wages order under section 30 of the *Family Law Reform Act*. In all other respects, maintenance creditors, whether they have a Supreme Court judgment, a county or district court judgment, or an order of a provincial court (family division), must share rateably with other creditors of the maintenance debtor enforcement proceeds for which they are responsible.[190]

The Commission is of the view that maintenance creditors, who, in many cases, are dependent upon their maintenance payments for their day-to-day necessities, do not enjoy adequate protection under the present law. In our view, the obligation owed by a debtor to a maintenance creditor is of a higher order than that owed by the debtor to any of his or her other creditors. The courts have said on a number of occasions that satisfaction of support or maintenance debts must come before payment of one's ordinary creditors.[191] We share this opinion. That there is a need for greater protection of maintenance creditors is apparent from the statistics respecting the amount of maintenance or support arrears owing – in the last year in which figures were kept, there were arrears outstanding in the amount of approximately forty million dollars.[192] The question that has

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[189] See *supra*, this ch., sec. 4(b)(ii)a.

[190] In the case of garnishment proceeds, however, while a maintenance creditor may theoretically be required to share these proceeds with other execution and certificate creditors, s. 4(3) of the *Creditors' Relief Act*, *supra*, note 2, will mean that, in practice, the maintenance creditor will not have to share: see discussion *supra*, this ch., sec. 2(b)(iii).

[191] See, for example, *Re Makkinga and Makkinga (No. 2)* (1980), 28 O.R. (2d) 249 (Dist. Ct.).

[192] See Laskin *et al.*, *Debtor and Creditor: Cases, Notes and Materials* (2d ed., 1982), at 489.

troubled us is the extent to which such creditors should be favoured under a revised *Creditors' Relief Act*, since a broader priority for maintenance creditors might have a significant impact on the enforcement practices of other creditors.

One alternative considered by the Commission is that recently adopted by the Legislative Assembly of Alberta. In 1977, the Alberta *Domestic Relations Act*[193] was amended to provide maintenance creditors with greater protection in enforcement proceedings.[194] The 1977 amendments, now in force,[195] have the following effect. Where a maintenance debtor is in arrears in respect of a maintenance order, the maintenance creditor's writ of execution is entitled to priority over other writs of execution to the extent of three months maintenance payments.[196] In addition, as a result of the 1977 amendments,[197] where a maintenance creditor resorts to garnishment to collect arrears under a maintenance order, the proceeds realized thereby are not subject to the Alberta equivalent of the Ontario *Creditors' Relief Act*, that is, the *Execution Creditors Act*.[198]

Shortly after these amendments were promulgated, they were the subject of review by the Alberta Institute of Law Research and Reform.[199] The only additional protection for maintenance creditors recommended by the Alberta Institute in its 1978 *Report on Matrimonial Support* was a priority for proceeds realized as a result of a continuing attachment of earnings order along the lines of the priority found in section 30(3) of the Ontario *Family Law Reform Act*.[200] However, it should be noted that, although the Alberta Institute proposed no other changes concerning the position of maintenance creditors, it was less than enthusiastic in its support of the 1977 amendments to the Alberta *Domestic Relations Act*. Nevertheless, given the fact that the matter had been reviewed so recently by the Alberta legislature, the Alberta Institute saw little purpose in recommending sweeping changes in the law.[201]

A second option examined by the Commission – an option considerably more far-reaching in scope – would be to recommend that maintenance creditors receive a priority for the full amount of their judgments with respect to proceeds realized as a result of both their own enforcement efforts and those of other non-maintenance creditors. This alternative has certain, obvious attractions, as it would guarantee to all maintenance creditors a preferred position in any scheme of distribution.

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193 R.S.A. 1970, c. 113.

194 *The Domestic Relations Amendment Act, 1977*, S.A. 1977, c. 64, s. 6.

195 As of June 30, 1979.

196 *Supra*, note 194, adding s. 28.2(6) and (7) to *The Domestic Relations Act*, *supra*, note 193. (See, now, *Domestic Relations Act*, R.S.A. 1980, c. D-37, s. 30(6).)

197 *The Domestic Relations Amendment Act, 1977*, *supra*, note 194, adding s. 28.3 to *The Domestic Relations Act*, *supra*, note 193. (See, now, *Domestic Relations Act*, R.S.A. 1980, c. D-37, s. 31.)

198 R.S.A. 1980, c. E-14.

199 Alberta Institute of Law Research and Reform, *Report on Matrimonial Support* (1978).

200 *Ibid.*, at 138-39.

201 *Ibid.*, at 130-33.

We recognize that such a priority has certain disadvantages. For example, it might make other judgment creditors somewhat reluctant to instruct the enforcement office to take active enforcement measures against their debtors. Nevertheless, we believe that the collection of support and maintenance payments is of such importance as to justify running this risk.

A more serious objection to a full priority in favour of maintenance creditors may be found in the Payne Committee Report, where the concern was expressed that other creditors would resort to bankruptcy proceedings to overcome such a priority.[202] It should be noted that neither the present *Bankruptcy Act*[203] nor the proposed new *Bankruptcy Act*[204] gives maintenance creditors any preference. Consequently, it might well be advantageous for an ordinary judgment creditor to petition a maintenance debtor into bankruptcy. While this is a real possibility, we are nevertheless of the view that the principle of a maintenance creditor's priority should receive the sanction of the provincial legislature.

Accordingly, we recommend that maintenance creditors should be entitled to be paid in full in priority to all other creditors under the revised *Creditors' Relief Act*. We further recommend that, for the purposes of the proposed maintenance creditor's priority, maintenance creditors should be defined to include not only persons with a support order or maintenance order in their favour, but also creditors who have obtained a money judgment based on the support or maintenance provisions of a cohabitation agreement, marriage contract, separation agreement, or paternity agreement, as defined by the *Family Law Reform Act*.[205] We can see no rational basis upon which to distinguish between the two types of maintenance or support creditor – a position that we have adopted in respect of similar issues on a number of occasions throughout the *Report on the Enforcement of Judgment Debts and Related Matters*.[206] Finally, in order to preclude the use of bankruptcy proceedings to circumvent this proposed priority, we recommend that the Parliament of Canada ought to be urged to give effect to this principle in any new bankruptcy legislation.

In chapter 3 of Part I of the Commission's 1981 *Report on the Enforcement of Judgment Debts and Related Matters*, we discussed the manner in which effect should be given to the principle of a maintenance creditor's priority. It was the opinion of the Commission that, rather than putting the onus on the enforcement office to satisfy itself prior to the distribution of

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[202] See Payne Committee Report, *supra*, note 143, para. 1117, at 293:

> [W]e feel that it would be unrealistic not to recognize in our proposed enforcement system the same priorities as obtain in bankruptcy. Otherwise there would be a risk – as to the extent of which the Committee is not wholly in agreement – that creditors might resort to bankruptcy in order to obtain preferential treatment which they could not have in the Enforcement Office . . . .

See, also, paras. 1120 and 1121, at 294.

[203] *Supra*, note 21.

[204] Bill C-12, *supra*, note 21.

[205] *Supra*, note 28, ss. 50-53 and 58.

[206] See, for example, Commission Report, *supra*, note 1, Part II, at 93 and 174.

proceeds of enforcement that there are no maintenance creditors who could assert a claim to proceeds of enforcement in the hands of the sheriff, the onus should rest squarely with maintenance creditors, who would be the sole beneficiaries of the priority. Consequently, we proposed that only maintenance creditors who have filed with the enforcement office at the time any enforcement proceeds are realized a writ of enforcement containing a notation to the effect that it is in respect of a maintenance debt should be entitled to priority with respect to such proceeds.[207] In this way, the sheriff, by examining his books, would immediately be in a position to determine who is to receive the specific proceeds of enforcement in question.

We are of the view that, if non-maintenance creditors were to have access to this information, any adverse impact of the proposed maintenance creditor's priority would be minimized, for other creditors would be able to make an informed decision concerning whether it would be worthwhile to commence legal proceedings or enforcement proceedings against their debtors. Accordingly, we recommend that the register of maintenance judgment debts, which the enforcement office would be required to establish and maintain under an earlier recommendation,[208] should be a public register.

(ii) The Wage Creditor's Priority

As was pointed out earlier in this chapter, the other significant priority, or exception to the scheme of rateable distribution, embodied in the *Creditors' Relief Act* that has received the *imprimatur* of the Legislative Assembly of Ontario is the one in favour of wage creditors. At the present time, a wage creditor's priority exists under both the *Wages Act*[209] and the *Employment Standards Act*,[210] although in somewhat inconsistent terms. At this juncture, therefore, it may be useful to compare the existing statutory priorities in favour of wage creditors.[211]

Section 3 of the *Wages Act* and section 14 of the *Employment Standards Act* provide, respectively, as follows:

> 3. All persons who, at the time of the seizure by the sheriff or who within one month prior thereto, were in the employment of the execution debtor, and who become entitled to share in the distribution of money levied out of the property of a debtor within the meaning of the *Creditors' Relief Act* are entitled to be paid out of such money the wages due to them by the execution

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[207] *Ibid.*, Part I, at 95-96.

[208] *Ibid.*

[209] *Supra*, note 89.

[210] *Supra*, note 104.

[211] For a discussion of the priorities accorded wage creditors in Canada generally, see Dunlop, *supra*, note 4, at 460-62; Christie, *Employment Law in Canada* (1980), ch. 8; and Zatzman, "The Unpaid Employee as Creditor: Case Comment on Homeplan Realty" (1980), 6 Dalhousie L.J. 148. See, also, the federal *Report of the Committee on Wage Protection in Matters of Bankruptcy and Insolvency* (October, 1981), at 18-21.

debtor, not exceeding three months wages, in priority to the claims of the other creditors of the execution debtor, and are entitled to share *pro rata* with such other creditors as to the residue, if any, of their claims.

14. Notwithstanding the provisions of any other Act and except upon a distribution made by a trustee under the *Bankruptcy Act* (Canada), wages shall have priority to the claims or rights and be paid in priority to the claims or rights, including the claims or rights of the Crown, of all preferred, ordinary or general creditors of the employer to the extent of $2,000 for each employee.

First, it should be noted that section 3 of the *Wages Act* may be relied upon only by persons who were in the employ of the judgment debtor "at the time of the seizure by the sheriff or within one month prior thereto". Section 14 of the *Employment Standards Act* contains no similar restriction: it would seem to be available to anyone who is owed wages.

Secondly, the *Wages Act*, unlike the *Employment Standards Act*, contains an additional requirement that must be satisfied before the wage creditor's priority may be claimed. To be entitled to the priority referred to in section 3 of the *Wages Act*, the wage creditor must be "entitled to share in the distribution of money levied out of the property of a debtor within the meaning of the *Creditors' Relief Act*". In other words, the wage creditor must be either an execution creditor or a certificate creditor within the meaning of the Act.[212] Again, no similar limitation exists in respect of the priority established by section 14 of the *Employment Standards Act*.

Thirdly, the extent of the priority varies from statute to statute. In the case of the *Wages Act*, a person may be entitled to a priority for up to three months wages, with no maximum amount fixed by statute. Under the *Employment Standards Act*, on the other hand, priority may be claimed only in respect of $2000. In some instances, the former may prove to be a greater amount, although the latter generally will be more beneficial to the low-income earner.

A fourth difference between these two statutory provisions may prove to be extremely important in certain cases. Section 14 of the *Employment Standards Act* provides that the wage creditor is to have priority over all unsecured creditors of the employer, including the Crown. No such priority for wage creditors is to be found in section 3 of the *Wages Act*.

Finally, it is worth pointing out that the definition of wages in the *Employment Standards Act*[213] may well be substantially broader than that

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[212] See s. 5(2) of the *Creditors' Relief Act*, *supra*, note 2.

[213] *Supra*, note 104, s. 1(*p*), which provides as follows:

> 1(*p*) 'wages' means any monetary remuneration payable by an employer to an employee under the terms of a contract of employment, oral or written, express or implied, any payment to be made by an employer to an employee under this Act, and any allowances for room or board as prescribed in the regulations or under an agreement or arrangement therefor but does not include,
>
> (i) tips and other gratuities,
>
> (ii) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and are not related to hours, production or efficiency,
>
> (iii) travelling allowances or expenses,
>
> (iv) contributions made by an employer to a fund, plan or arrangement to which Part X of this Act applies.

contained in the *Wages Act*.[214] This too may prove quite significant in a particular case.

While we can see no reason for the existence of both section 3 of the *Wages Act* and section 14 of the *Employment Standards Act*, we believe that wage creditors should continue to have the benefit of some priority *vis-à-vis* other creditors of their debtor. A great many provinces have legislation to this effect,[215] and the *Bankruptcy Act*[216] too provides wage creditors with some priority in recognition of the importance of wage claims.

Our reasons for proposing a wage creditor's priority are similar to those expressed in proposing a broad maintenance creditor's priority,[217] and to those supporting the wage garnishment exemption recommended in chapter 3 of Part II of the Commission's *Report on the Enforcement of Judgment Debts and Related Matters*.[218] In short, just as maintenance creditors rely for the most part on the payment of support or maintenance to secure the necessities of life, so the majority of the Canadian public is dependent on wages for their day-to-day survival. Consequently, a certain percentage or amount of a person's wages must be guaranteed.

In considering the garnishment of wages, the Commission supported a policy that generally would exempt from garnishment eighty-five percent of a person's wages and income.[219] Although a priority for a similar percentage would have the advantage of conceptual neatness, for the sake of administrative convenience we have decided instead upon a three months priority for wages similar to that now contained in the *Wages Act*. While such a priority may, practically speaking, treat wage creditors differently, in our view, it has the advantage of more accurately reflecting the needs of a particular wage creditor. In addition, a three months wages priority will not be subject to the ravages of inflation as would a priority of $2000 or some other figure. It would be possible, of course, to tie such a figure to the Consumer Price Index in order to keep pace with inflation. However, in our opinion, a three months wages priority on the whole would be easier to administer and just as effective.

Accordingly, subject to the discussion below respecting the relative

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214 Wages are defined in s. 1 of the *Wages Act*, *supra*, note 89, to mean "wages or salary whether the employment in respect of which the same is payable is by time or by the job or piece or otherwise".

215 See, for example, *Execution Creditors Act*, R.S.A. 1980, c. E-14, s. 16, and *Employment Standards Act*, R.S.A. 1980, c. E-10.1, s. 100(1); *Creditor Assistance Act*, R.S.B.C. 1979, c. 80, s. 36; and *Wage Earners Protection Act*, R.S.N.B. 1973, c. W-1, s. 4(1).

216 *Supra*, note 21. Priority for wage creditors is retained in Bill C-12, *supra*, note 21, s. 265.

217 See *supra*, this ch., sec. 6(c)(i).

218 See Commission Report, *supra*, note 1, Part II, at 168.

219 *Ibid*.

priorities of maintenance and wage creditors, the Commission recommends that wage creditors should be entitled to a priority over other enforcement creditors in respect of three months unpaid wages. In all other respects, the wage creditor's priority should resemble the priority outlined in section 14 of the *Employment Standards Act* rather than the one described in section 3 of the *Wages Act*. Consequently, the wage creditor should not have to prove that he was in the debtor's employ "at the time of seizure . . . or within one month prior thereto"; rather, he should be required to show simply that he is owed a specific amount by the debtor for unpaid wages. We are also of the view that the definition of wages that should be adopted for the purpose of determining a particular wage creditor's priority should be the broader one contained in section 1(*p*) of the *Employment Standards Act*.

Finally, we wish to make some comments regarding the manner in which a wage creditor's claim should be established. We mentioned earlier that, under the *Wages Act*, before a wage creditor will be allowed a priority, he must have delivered to the sheriff either a judgment, or a certificate procured pursuant to the Act, in respect of his wages. In the light of the Commission's proposal to abolish the certificate procedure and to eliminate the grace period[220] now sanctioned by section 5(2) of the *Creditors' Relief Act*, and given the Commission's recognition of the prime importance of wages to the general populace,[221] some other means of establishing a wage claim must be adopted. The method favoured by the Commission is the one already available under the *Employment Standards Act*. Section 47 of the Act empowers an employment standards officer to make certain orders where he finds that an employee is entitled to any wages by his employer. Where an order has been made under this section, the Director of Employment Standards is authorized to "issue a certificate thereof and cause the same to be filed in a court of competent jurisdiction and thereupon the certificate shall be enforceable as a judgment or order of the court".[222] Similar legislation is to be found in a number of the other provinces.[223]

We believe that a scheme whereby a wage creditor could apply for such a certificate, which he himself then could file with the enforcement office, would be quite advantageous to the wage creditor. The procedure would be a simple and straightforward one; it would be swift and economical, and the claims could be resolved by persons who have developed a certain expertise respecting such matters. Accordingly, we recommend that a wage creditor should establish his entitlement to a priority in respect of any proceeds of enforcement in the hands of the new enforcement office by filing with the enforcement office either a writ of enforcement or a certificate of unpaid wages issued under the *Employment Standards Act*.

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[220] See *supra*, this ch., secs. 6(b)(i) and (iii).

[221] See, for example, Commission Report, *supra*, note 1, Part II, at 154-57.

[222] *Employment Standards Act*, *supra*, note 104, s. 54(1).

[223] See, for example, *The Executions Act*, R.S.M. 1970, c. E160, s. 9; *Wage Earners Protection Act*, R.S.N.B. 1973, c. W-1, s. 4; and *The Creditors' Relief Act*, R.S.S. 1978, c. C-46, s. 15.

(iii) Distribution among Creditors Entitled to Priority

The Commission has proposed above that maintenance creditors should be entitled to priority over other enforcement creditors to the full extent of any outstanding support or maintenance debt. We also have advocated that wage creditors should be preferred in any distribution of enforcement proceeds in respect of three months unpaid wages. We must now consider the relationship between these two very important priorities.

Although far from an easy decision to make, the Commission has decided that these two groups should be ranked as follows: first, maintenance creditors and, secondly, wage creditors. As we have pointed out, the creditors in each of these categories are likely to be dependent upon the income in question for the day-to-day necessities of life. However, it is the view of the Commission that a maintenance creditor is likely to have more difficulty finding an adequate, alternative source of income than an unpaid wage earner. Indeed, a wage creditor may well have secured another position of employment with a regular source of income at the time he is seeking to recover unpaid wages. Therefore, the Commission recommends that maintenance creditors should be entitled to a priority over wage creditors.

One other matter concerning these two categories of preferred creditor that we believe should be dealt with is the rights of creditors in each of these categories *vis-à-vis* one another. For example, there may well be a number of wage creditors claiming to be entitled to certain proceeds of enforcement. Similarly, it is possible to envisage a situation in which more than one maintenance creditor of the same debtor is vying to be paid out of the same fund.[224] If nothing more were said, it might be argued that, between or among maintenance creditors or wage creditors, a "first come, first served" regime prevails. We believe that this matter should be put beyond doubt. We can see no reason why the basic principle of rateable distribution should not govern in such circumstances as well: in such a way, the burden of any shortfall could be shared equally by all the creditors in the category entitled to the proceeds. In the case of wage creditors, there already exists an express precedent for such a scheme. Section 53(4) of the *Employment Standards Act* provides as follows:

> 53.-(4) Where the moneys received by the Director under this Act are insufficient to pay the wages due employees of an employer in full, the Director shall distribute the moneys received by him, including any penalty, rateably among those employees on whose behalf the moneys were received.

Insofar as maintenance creditors are concerned, while they do not enjoy a general priority at the present time, any proceeds of enforcement to which such creditors now would be entitled would have to be shared rateably in accordance with the *Creditors' Relief Act*.[225]

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[224] Since the enactment of the *Family Law Reform Act*, *supra*, note 28, the likelihood of this occurring has been increased, for this Act imposes an obligation of support not only on spouses by marriage, but also on common law spouses: see the definition of "spouse" in s. 14 of the Act. The *Family Law Reform Act* also obligates every parent to provide support for his or her child (s. 16) and every child who is not a minor to provide support for his or her parent (s. 17).

[225] See *Billinghurst v. Billinghurst* (1977), 3 C.P.C. 247 (S.C.O. Master).

Accordingly, with one qualification, we recommend that proceeds of enforcement should be distributed rateably among creditors in the same category in the case of both maintenance creditors and wage creditors. Given the power of the courts to vary a support[226] or maintenance order,[227] and the possibility of unique circumstances where several maintenance creditors of the same debtor, with varying degrees of need, claim to be entitled to enforcement proceeds, we recommend that a provincial court (family division) should be empowered to impose some scheme of distribution other than rateable distribution upon maintenance creditors, where it considers it just and equitable to do so. The principle of rateable distribution would apply to maintenance creditors unless there is an order to the contrary.

(d) The Crown's Right to Priority

"I do not think there can be a doubt that the Crown is entitled at common law to a preference in a case such as this, for when the rights of the Crown come in conflict with the right of a subject in respect to payment of debts of equal degree, the right of the Crown must prevail . . .". So commented Chief Justice Ritchie in an 1885 judgment of the Supreme Court of Canada, *The Queen v. Bank of Nova Scotia*.[228] In this section, the Commission will examine whether this long accepted rule of the common law should continue to be the law of Ontario. In considering this question, it should be kept in mind that the Crown's right to priority has been restricted, to a greater or lesser degree, by a number of statutes, including the *Bankruptcy Act*[229] and the *Employment Standards Act*.[230] Clearly, this royal prerogative is far from immutable.

In recent years, the privileged position of the Crown, especially in the context of bankruptcy and insolvency, has come under increasing attack. For example, both the *Report of the Commission on the Bankruptcy Laws of the United States*[231] and the Canadian *Report of the Study Committee on Bankruptcy and Insolvency Legislation*[232] were highly critical of the preference enjoyed by the government or Crown under existing bankruptcy and insolvency legislation. It may be useful to quote at length from the *Report of the Study Committee on Bankruptcy and Insolvency Legislation* on this subject:[233]

> It is, we believe, important to re-examine the public policy in respect of the Crown priority. It must be determined whether such a priority is justified in a modern society. Certainly, it is not necessary for the financial stability of the government. The argument that the Crown cannot choose its own debtor has

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[226] See the *Family Law Reform Act*, *supra*, note 28, s. 21.

[227] See the *Divorce Act*, R.S.C. 1970, c. D-8, s. 11(2).

[228] (1885), 11 S.C.R. 1, at 10.

[229] *Supra*, note 21, s. 107.

[230] *Supra*, note 104, s. 14, discussed *supra*, this ch., sec. 6(c)(ii).

[231] Part I (1973), at 214 *et seq.*

[232] *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970), at 122 *et seq.*

[233] *Ibid.*, at 122-23.

> some relevance in claims for taxes, but none, as regards contractual claims. In this respect, it should be pointed out that individuals claiming damages do not choose their debtors either; and yet, they do not benefit by a priority of rank. One wonders whether, in our economy of easy credit, the businessman has always the economic freedom to choose his debtor or whether he is not bound, to a certain point, to give credit to the same extent as do his closest competitors. It could even be argued that the government should rank after ordinary creditors, as the public treasury is, in fact, in a better position than anyone to bear the inevitable losses. The government can, in effect, divide the burden of tax left unpaid by the bankrupt among all the tax paying public. It would be more logical for the government to do this, than to take advantage of the bankruptcy of an insolvent taxpayer to reimburse itself, at the expense of the creditors who have already suffered losses. Certainly, there can be no rational explanation for the government to attempt to obtain payment of the tax due by a bankrupt from his creditors. Such a proposition offends one's sense of natural justice.
>
> Whatever the logic or lack of logic there is in the priority of the Crown, the cumulative impact of the priority has substantially increased since the Second World War. Crown priorities have grown in three dimensions: (1) the rates of existing or old taxes have been increased; (2) there have been many new kinds of taxes; and (3) the Crown has become extensively engaged in business, particularly through the use of Crown corporations to which the Crown priority has been held, in many cases, to apply. The apathy of creditors to take part in the administration of an estate in bankruptcy can very well be explained by reason of the Crown priority. Very often, for the creditors to involve themselves in the administration of estates is equivalent to their volunteering as agents of the public treasury.
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> . . . .
>
> In our opinion, the priority of the Crown in our modern society cannot be justified and we recommend that it be abolished.

Essentially, the arguments raised in support of the abolition of Crown priority in the bankruptcy context are three in number. First, it is contended that the government can better absorb losses than can private creditors, since the government has the ability to distribute losses among its many taxpayers. Secondly, it is argued that creditors who are assured of a larger dividend are more likely to involve themselves in bankruptcy administration, thereby improving the process. Thirdly, it is pointed out that the Crown's priority is an historical anachronism, which is of little or no relevance today.

These arguments have not gone unchallenged. However, even commentators who support a Crown priority in the context of bankruptcy proceedings recognize the need to limit this priority severely. One commentator,[234] for example, has drawn a distinction between debts voluntarily incurred and what may be termed "involuntary debts", such as taxes, noting the following distinction between these two types of debt:[235]

> [A] private business creditor who extends credit anticipates a profit or business advantage in return for which he voluntarily accepts the risk of the debt-

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[234] See Shanker, "The Worthier Creditors (And a Cheer for the King)" (1975-76), 1 Can. Bus. L.J. 340.

[235] *Ibid.*, at 345.

> or's insolvency. If the risks outweigh the business advantages, then the private creditor need not proceed with the transaction, or can demand cash or security. On the other hand, the Government is required to furnish to the bankrupt the services which give rise to the tax debt; and has no practical way of avoiding the risk of default by insisting upon cash in advance or security. Indeed, realistically speaking, the Government has no way even of determining the full debt due it until that debt is long overdue.

As a result, it was urged "that the Government tax claims are more worthy than those of a business creditor; and thus entitled to priority in a bankruptcy situation".[236]

In a similar vein, the Payne Committee Report contained the following argument with respect to a right of priority for taxes:[237]

> These debts are owed not to private creditors as are trading debts, loans of money and so forth, but the community at large, represented either by the local authorities for the collection of rates or the Board of Inland Revenue for the collection of tax. These debts are also involuntary in that the claimants have had no choice in the granting of credit to ratepayers and taxpayers. They cannot withdraw or restrict credit in the same way as a trading concern or private creditor. For these reasons they lack that control over the debtor which is to some extent enjoyed by the general body of creditors. . . .

Two recent reports, on the other hand, have proposed a total abolition of the Crown priority. In 1978, the Australian Senate Standing Committee on Constitutional and Legal Affairs issued a Report entitled *Priority of Crown Debts*.[238] This Committee examined the subject of Crown priority not only in the context of bankruptcy, but also as it relates to "corporate liquidations or other cases of impecunious persons or corporations".[239] After examining the basis of the priority, the Report listed and discussed the major objections to the Crown priority in Australia, namely, the hardship occasioned thereby, the complexity of the law, the inhibiting effect of the Crown's priority on other creditors, the uncertainty occasioned by it, and the resultant delay in payment.[240] The Committee in the end recommended the total abolition of all rights to priority enjoyed by the Crown.[241] The Committee drew no distinction between tax debts and other Crown debts.

As a "second-best" solution, the Australian Senate Standing Committee on Constitutional and Legal Affairs suggested that "certain taxes should be accorded priority only as to the amount owing in respect of the 3 months immediately preceding the commencement of the insolvency administration".[242] While this suggestion was framed in terms of insolvency, it would seem equally appropriate in the case of a distribution under

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[236] *Ibid.*

[237] Payne Committee Report, *supra*, note 143, para. 1115, at 292.

[238] Australian Senate Standing Committee on Constitutional and Legal Affairs, *Priority of Crown Debts* (1978).

[239] *Ibid.*, at 1.

[240] *Ibid.*, ch. IV.

[241] *Ibid.*, at 42 and 57.

[242] *Ibid.*, at 63.

the revised *Creditors' Relief Act*. A Crown priority limited in this way would reduce the hardship that results from a Crown priority and the inhibiting effect of the priority on other creditors. However, as the Committee pointed out, "anything short of total abolition would not solve the problems of complexity, uncertainty, delay, and expense which are the product of Crown priority".[243]

Interestingly, the Australian Senate Standing Committee on Constitutional and Legal Affairs made specific reference to the likely financial consequences of abolition. For a variety of reasons, it did not believe that the fiscal repercussions of abolition would be very serious. First, the amount of revenue foregone, in absolute terms, did not appear to be significant.[244] Secondly, the Committee pointed out that "abolition of the Crown's priority would not result in the Commonwealth receiving no distribution . . . . It would still . . . receive partial repayment of its debts . . . ."[245] Thirdly, the Committee noted that "the increased amounts recovered by other creditors if priority were abolished" would mean that "these creditors would pay increased income tax because of the reduction in the quantum of bad debts".[246] Finally, it suggested that the abolition of the Crown priority likely would result in greater efforts by ordinary creditors to recover their debts, with the result that "greater sums could be expected to be recovered".[247]

The Law Reform Commission of British Columbia also has recently examined the arguments for and against the retention of the Crown's prerogative right to priority.[248] Relying heavily on the Report of the Australian Senate Standing Committee on Constitutional and Legal Affairs, the British Columbia Commission has proposed that "[t]he prerogative right of the Crown in right of British Columbia as a creditor to priority over other creditors of the same debtor be abolished".[249] In large part, this proposal was animated by the following reasoning:[250]

> Even if one adopts the position that there may be cases in which the claim of the Crown should be preferred, the prerogative right, as a rule of general application, proceeds on an entirely wrong principle. Essentially, the prerogative demands that priority should be determined by reference to the character of the creditor rather than by the character of the claim. This is indefensible in a society that long ago completed the transition from status to contract.

Like the Law Reform Commission of British Columbia and the Aus-

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[243] *Ibid.*

[244] *Ibid.*, at 44. This fact may well serve as a double-edged sword. For example, Shanker, *supra*, note 234, at 346-47, points to the fact that government claims take up only a small share of a bankrupt's estate as, perhaps, an argument in favour of retaining the Crown priority.

[245] *Supra*, note 238, at 45.

[246] *Ibid.*

[247] *Ibid.*

[248] See British Columbia Priorities Report, *supra*, note 105.

[249] *Ibid.*, at 42 (emphasis deleted).

[250] *Ibid.*, at 40.

tralian Senate Standing Committee on Constitutional and Legal Affairs, we too favour abolition of the Crown's royal prerogative to be paid in priority to creditors of equal degree. The Commission adopts this view not because the Crown has a "deep pocket" and, therefore, may be in a better position to absorb and distribute its losses.[251] Rather, we are persuaded in part by the financial evidence assembled by the Australian Senate Standing Committee on Constitutional and Legal Affairs concerning the limited impact on the Crown of abolition of the right to priority. We also agree with both the Committee and the Law Reform Commission of British Columbia that the problems resulting from the Crown's priority far exceed the benefit to the Crown derived therefrom. Finally, we share the view of the Law Reform Commission of British Columbia that the Crown's right to priority over creditors of equal degree is an historical anomaly, out of place in an age of "equality before and under the law".[252] Accordingly, we recommend that the right of the provincial Crown to be preferred over creditors with debts of equal degree in any distribution of enforcement proceeds should be abolished.

We recognize that abolition of the provincial Crown's right to priority, without similar action being taken in respect of the federal Crown's right to priority, could result in the latter enjoying a priority over claims of the provincial Crown. To avoid such a result, we would recommend that the Parliament of Canada be asked to do away with the federal Crown's royal prerogative to priority.[253] Given the state of legal authorities respecting the power of a provincial legislature to impinge on any of the royal prerogatives enjoyed by the federal Crown,[254] it would be best if the Parliament of Canada specifically addressed itself to this issue and introduced appropriate legislation.

(e) Statutory and Common Law Liens and Charges

In addition to the common law right of the Crown to priority, another source of great frustration for ordinary unsecured judgment creditors is the seeming plethora of statutory and common law liens and charges in favour of the Crown, a Crown agency or, in some cases, individual creditors, which now are not required to be registered in order to be effective. As in the case of the prerogative right to priority, these unregistered liens and charges can cause hardships for enforcement creditors, inhibit enforcement creditors from taking active measures against their debtor, and occasion a great deal of uncertainty and delay in the distribution of enforcement proceeds. What follows, then, are a number of proposals that the Commission views as a minimum for reform of this area of the law.

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[251] See Shanker, *supra*, note 234, at 343-44. See, also, Payne Committee Report, *supra*, note 143, para. 1115, at 292.

[252] See s. 15(1) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, scheduled to the *Canada Act 1982*, c. 11 (U.K.). Section 15 comes into force on April 17, 1985.

[253] For a somewhat similar proposal, see British Columbia Priorities Report, *supra*, note 105, at 42.

[254] Some of the leading authorities may be found in note 110, *supra*.

Because of the wide variety of circumstances in which statutory and common law liens and charges may arise, we do not think that it is appropriate to attempt to determine, in the context of this Report, whether, for example, any or all such liens and charges should be abolished. Given the complexity of the subject-matter, we recommend that statutory and common law liens and charges should be the subject of a separate, in-depth study. The recommendations that follow are designed simply to eliminate some of the uncertainties and injustices that are the result of the present state of the law.

(i) Land

We turn first to the problems experienced by creditors as a result of the great many unregistered liens and charges that affect land. In this context, comments contained in the Commission's 1971 *Report on Land Registration*[255] may be noteworthy. In that Report, the Commission outlined the problem of unregistered claims affecting land in the following terms:[256]

> The problem . . . is to determine what claims, if any, should be effective, even though not registered.
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> The general factors to be considered are cost, and the effect on a claim of a requirement of registration for effectiveness. The cost to be considered is the cost of making the registration, or the cost of making searches for the claims if no requirement of registration is imposed.
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> The effect of a requirement of registration is more complex. Some claims might not be registered because of ignorance – either ignorance of the existence of the claim itself or ignorance of the requirement of registration. The requirement may make a claim less effective, either because administrative difficulties may prevent registration immediately after the claim arises or because the owner of the claim may not know the identity of the land against which it can be registered.
>
> At present a bewildering array of claims that need not be registered exists. Many of them are a potential trap for an unwary purchaser if a search is not made, or require an inefficient dispersal of time and energy if a search is made.

If read in terms of the enforcement process, rather than the system of land registration, the preceding remarks would provide a most apt description of the effect of unregistered liens and charges.

To minimize what the Commission viewed as a "potential trap for an unwary purchaser", and to increase efficiency in the conveyancing process, it advocated two major reforms. First, insofar as liens against specific parcels of land were concerned, the Commission proposed that all such liens "must be registered to be enforceable, except for the lien to secure payment of municipal taxes, and other debts that are secured and collected

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[255] Ontario Law Reform Commission, *Report on Land Registration* (1971).

[256] *Ibid.*, at 34.

through this lien".[257] This recommendation was based on the Commission's view that arrears of municipal taxes could be discovered "without much cost or difficulty", whereas registration "would be extremely expensive for the foreseeable future, although the adoption of electronic technology and the integration of systems of information about land may eventually eliminate this cost".[258] This recommendation has not been implemented to date.

Secondly, with a couple of exceptions, we supported the abolition of liens purporting to bind all the lands of a particular debtor.[259] We gave as our reason the fact that, since such liens "are rarely enforced against purchasers if searches are not made", "the substantial cost of searching, or the uncertain prospect of a claim if searches are not made, is larger than any possible loss of revenue".[260] The exceptions to this recommendation concerned writs of execution[261] and liens to secure the payment of corporations tax[262] and succession duty.[263] Insofar as the latter were concerned, we were of the view that the inconvenience and annoyance for lawyers, and the costs to their clients occasioned thereby, were outweighed by the revenue they protected.

The legislative response to these two important recommendations should be noted. Appendix I of the Commission's 1971 *Report on Land Registration* listed six statutes that created government liens against all land owned by the debtor.[264] Nearly all these general liens have been abolished.[265] More significant, in our view, is the fact that the Legislative Assembly of Ontario has seen fit to abolish one of the general liens whose retention we considered justified. As a result of recent amendments to *The Corporations Tax Act, 1972*,[266] the general lien available thereunder has been eliminated.[267] To be effective, a corporation tax lien now must be registered against the property sought to be bound.

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[257] *Ibid.*, at 37. The existing legislation normally provided for one of two kinds of lien: one attached to a particular piece of real property; the other bound all the debtor's property wherever situated in the Province.

[258] *Ibid.*, at 38.

[259] *Ibid.*

[260] *Ibid.*, at 39.

[261] *Ibid.*, at 41 *et seq.*

[262] *Ibid.*, at 38.

[263] *Ibid.*

[264] The statutes listed there are *The Corporations Tax Act*, R.S.O. 1960, c. 73, s. 91(1); *The Logging Tax Act*, R.S.O. 1960, c. 224, s. 31; *The Motor Vehicle Fuel Tax Act*, R.S.O. 1960, c. 248, s. 17; *The Retail Sales Tax Act, 1960-61*, S.O. 1960-61, c. 91, s. 16; *The Tobacco Tax Act, 1965*, S.O. 1965, c. 130, s. 7(2); and *The Assessment Act, 1968-69*, S.O. 1968-69, c. 6, ss. 8(15) and 33(14).

[265] See *The Corporations Tax Amendment Act, 1979 (No. 2)*, S.O. 1979, c. 89, s. 1; *The Motor Vehicle Fuel Tax Amendment Act, 1975*, S.O. 1975, c. 10, s. 5; *The Retail Sales Tax Amendment Act, 1975*, S.O. 1975, c. 9, s. 7; *The Tobacco Tax Amendment Act, 1979*, S.O. 1979, c. 17, s. 4; and *The Assessment Amendment Act, 1972*, S.O. 1972, c. 125, s. 2, repealing s. 8 of *The Assessment Act*, R.S.O. 1970, c. 32. Section 33(14) of this Act is still in effect.

[266] S.O. 1972, c. 143.

[267] *The Corporations Tax Amendment Act, 1979 (No. 2)*, S.O. 1979, c. 89, s. 1. The other general lien that the Commission excepted from its recommendation for the abolition

We would note that, in introducing the amendments in question, the Minister of Revenue commented as follows:[268]

> The development of more effective collection methods, concentrating on delinquent payments and noncompliance with statute requirements, has enabled us to protect revenues where the statutory lien provisions have been repealed to date. This gives us every reason to expect the same result with respect to corporation taxes. In view of this, I believe the statutory lien is no longer required under The Corporations Tax Act.
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> In my ministry's quest for tax simplification and regulatory reform, we have recognized that only a small percentage of taxpayers poses any collection problem and that both the direct and indirect costs of our requirements to Ontario's taxpayers must be a paramount consideration. I estimate that corporate taxpayers incur costs of approximately $1.25 million annually in applying for and obtaining corporations tax lien clearances. Added to this is the cost incurred by individuals who have to obtain lien clearances where they are acquiring property which at some time within the preceding five years was owned by a corporation.
>
> Because of the 20 percent growth in lien clearance requests, taxpayer costs in this area would escalate substantially if the program were to continue. Over 200,000 applications for lien clearances are received yearly. For 80 per cent of these requests, approval is automatically given. The proposed measure to repeal the statutory lien will relieve the vast majority of taxpayers from complying with the present lien provision and thus represents a major step towards deregulation and tax simplification.

Turning to those statutes that create liens against specific parcels of land, we would note that general implementation of our recommendation in favour of registration has not been forthcoming.[269] In the context of the present Report, we would reaffirm our earlier recommendation that such liens should be effective only if and from the time they are registered. It is only through registration that an enforcement creditor is likely to learn of the existence of competing claims that may be entitled to priority, thereby enabling him to make informed decisions regarding the utility of taking legal proceedings or enforcement measures against his debtor. Only in this way can hardship to creditors be minimized, and complexity and delay in the distribution of enforcement proceeds be reduced significantly.

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of all general liens – in respect of succession duty – is no longer of concern since the repeal of *The Succession Duty Act*, R.S.O. 1970, c. 449, in 1979: see *The Succession Duty Repeal Act, 1979*, S.O. 1979, c. 20.

[268] See *Legislature of Ontario Debates*, 31st Parl. 3d Sess., November 6, 1979, at 4245.

[269] A number of such liens were required to be registered even at the time the Commission issued its 1971 *Report on Land Registration*: see, for example, *The Bail Act*, R.S.O. 1970, c. 37, ss. 2-5 (now R.S.O. 1980, c. 36, ss. 2-5); *The Farm Loans Act*, R.S.O. 1970, c. 158, s. 36 (now R.S.O. 1980, c. 154, s. 36); *The Legal Aid Act*, R.S.O. 1970, s. 239, s. 18 (now R.S.O. 1980, c. 234, s. 18); and *The Workmen's Compensation Act*, R.S.O. 1970, c. 505, s. 116(4) (now R.S.O. 1980, c. 539, s. 120(4)).

Compare, for example, *The Mining Act*, R.S.O. 1970, c. 274, ss. 101(4) and 672 (now R.S.O. 1980, c. 268, ss. 92(4) and 216); *The Mining Tax Act, 1972*, S.O. 1972, c. 140, s. 18 (now R.S.O. 1980, c. 269, s. 21); *The Power Corporation Act*, R.S.O. 1970, c. 354, s. 41(10) (now R.S.O. 1980, c. 384, s. 40(10)); and *The Provincial Land Tax Act*, R.S.O. 1970, c. 370, s. 26(1) (now R.S.O. 1980, c. 399, s. 26(1)).

Turning to liens that may be collected through the municipal tax lien, we find our earlier recommendation to exempt from any registration requirement liens for municipal taxes, and other debts that are secured and collected through this lien, to be inadequate in the present context. Up-to-date information concerning the nature of the debtor's property interests is central to the efficient and equitable operation of the enforcement system from the enforcement creditor's point of view. While this objective could be attained by a registration requirement, it also could be achieved by a simple requirement that the liens under discussion be added to the collector rolls in order to be guaranteed a priority in any distribution of enforcement proceeds realized from the sale of the particular parcel of land. Accordingly, we recommend that liens that now may be enforced through the municipal tax lien should be enforceable only if the amount in question is added specifically to the collector rolls. We would note that this recommendation would enure to the benefit not only of enforcement creditors but also to purchasers and others who seek to acquire an interest in land.

(ii) Personal Property

We come now to the subject of liens and charges against personal property of the debtor. Before proceeding any further, we should point out that we are concerned here only with non-possessory liens, since the mere fact of possession of the debtor's property by a third person will provide an enforcement creditor, in most cases, with an indication that the property may be subject to prior third party claims. Accordingly, the creditor is likely to proceed cautiously before instructing the enforcement office to take active enforcement measures against the property. Rather, the focus of the present concern is non-possessory liens and charges, which, by their very nature, may be difficult to discover. In part, this is due to the fact that the *Personal Property Security Act*[270] does not apply to such liens. This exclusion, while justified on the ground that the Act is concerned with consensual transactions,[271] may be attributable more to perceived problems associated with the inclusion of non-possessory liens in the personal property security registration system.[272] Whatever the reason may have been for exempting such liens from the operation of the *Personal Property Security Act* when the Act first was enacted, this is a matter that now perhaps should be re-examined.

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[270] R.S.O. 1980, c. 375, s. 3(1)(*a*).

[271] See Catzman *et al.*, *Personal Property Security Law in Ontario* (1976), at 3.

[272] See, for example, Law Reform Commission of Saskatchewan, *Proposals for a Saskatchewan Personal Property Security Act* (1977), at 11. The Commission considered the integration of the non-possessory lien granted by *The Garage Keepers Act*, R.S.S. 1965, c. 279, into the proposed *Personal Property Security Act*. The conclusion arrived at by the Commission was as follows:

> The Commission discovered that only through massive modification in the structure of *The Personal Property Security Act* or through substantial changes in the legislative policies underlying *The Garage Keepers Act* would a unified system be developed. It concluded that these were very high prices to pay for the convenience of such a system.

See, also, Ontario Law Reform Commission, *Report on the Non-Possessory Repairman's Lien* (1972).

In the interim, we believe that some minor changes to the present law should be made in order to facilitate enforcement against personal property of the debtor. In Part II of our *Report on the Enforcement of Judgment Debts and Related Matters*,[273] we made a number of recommendations concerning the consequences that ought to flow when a third party who has an interest in property that has been seized fails to assert a timely claim thereto. We proposed, *inter alia*, that in such circumstances the third party's claim to the property and the proceeds therefrom should be extinguished once the proceeds have been distributed.[274] To put the matter beyond doubt, we now recommend that a non-possessory lien or charge against personal property should bind the property only until sold and the proceeds therefrom only until distributed to those enforcement creditors entitled to receive a share of the proceeds. Consistent with our earlier recommendations, the Commission also recommends that a purchaser of personal property sold by the enforcement office should take it free and clear of any non-possessory lien or charge unless, prior to the sale, a valid claim has been filed with the enforcement office.

While some may see the Commission's proposals respecting statutory and common law liens and charges as radical, we are convinced that our recommendations provide a reasonable approach, one that successfully balances the interests of all concerned. We are fortified in this view by the fact that the new proposed *Bankruptcy Act*[275] takes a similar approach to certain unregistered security interests. Section 270(1) of the proposed Act provides as follows:

> 270.-(1) Where an arrangement or a bankruptcy order is made in respect of a debtor, any security interest to secure
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> (*a*) the payment of a tax claim,
>
> (*b*) contributions to social security plans, or
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> (*c*) the payment of a claim of a public utility for the provision of its services,
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> is void unless the security interest has been registered in fact before the date of filing a petition or a proposed arrangement in respect of the debtor, and not only deemed to be registered, pursuant to a general system of registration of security interests that is available not only to Her Majesty in right of Canada or of a province but also to every other creditor holding a security interest and that is open to the public for inspection.

(f) Other Priorities

(i) The Costs of Instructing Creditors

One of the criticisms voiced by the Law Reform Commission of British Columbia, in its 1979 *Report on Creditors' Relief Legislation: A New*

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[273] Commission Report, *supra*, note 1, Part II, at 263-64.

[274] *Ibid.*

[275] Bill C-12, *supra*, note 21.

Approach, concerned the position of a creditor who incurs costs in initiating enforcement proceedings against a debtor and then is required to share the proceeds of enforcement with other enforcement creditors of the debtor.[276] Without adequate compensation for the instructing creditor, it was argued, a creditors' relief regime gives rise to unfair results, and is likely to discourage creditors from initiating active enforcement measures. While noting that "[a]dequate compensation may make [the instructing creditor's] position somewhat more acceptable", the British Columbia Commission did not view compensation as a "complete answer". The Report stated: "Not all enforcement measures are successful, and there is no acceptable way to pass the costs of *abortive* enforcement measures on to other creditors."[277] Given this Commission's decision to recommend the retention, albeit in an altered form, of the *Creditors' Relief Act*, it has been necessary to grapple with the criticisms of the Law Reform Commission of British Columbia set out above.

It will be recalled that a number of provisions of the present Act are directed to providing the successful enforcement creditor with compensation. For example, sections 5(2) and 26 provide that, before the distribution of enforcement proceeds, "the creditor at whose instance and under whose execution the seizure and levy were made" is entitled to "payment in full of the taxed costs and the costs of the execution". Section 5(2) provides a priority in respect of the costs of garnishment to a creditor obtaining an attaching order. Reference should also be made to the priority accorded a creditor who resorts to equitable execution,[278] and that to which a creditor responsible for an attachment of the debtor's property under the *Absconding Debtors Act*[279] is entitled.[280]

For the most part, we find the approach adopted in the *Creditors' Relief Act* to be just and equitable, and sufficient to ensure that but few creditors will be unwilling to engage in active enforcement measures against their debtors, even though the proceeds realized thereby will be required to be shared rateably by all enforcement creditors. There are a number of matters in the present legislation, however, that do require the Commission's attention.

First, under section 26 of the Act, referred to above, only the first instructing creditor is entitled to a priority in respect of his taxed costs and costs of execution. Other creditors who may also have instructed the sheriff to enforce their judgments are simply entitled to add enforcement costs to their judgment and to a *pro rata* share of any distribution based on this total amount.[281] We find this to be an unsatisfactory state of affairs.

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[276] British Columbia Report, *supra*, note 55, at 17.

[277] *Ibid.*

[278] *Creditors' Relief Act*, *supra*, note 2, s. 24.

[279] *Supra*, note 48.

[280] *Creditors' Relief Act*, *supra*, note 2, s. 21(1).

[281] This would be in addition to any interest they might be entitled to pursuant to their judgments: see *Creditors' Relief Act*, *supra*, note 2, s. 32(1). Where, of course, two or more creditors have instructed the sheriff in respect of different pieces of property of the debtor, and the sheriff has been successful in seizing and selling the property, each

Throughout this chapter, we have sought to avoid the creation of a scheme of distribution where the race goes to the swiftest. In our view, this can be accomplished by providing every instructing creditor with the same priority insofar as his costs of enforcement are concerned.[282] We turn now to discuss the particulars of the proposed priority.

In our view, the priority should be available only to creditors who successfully undertake enforcement proceedings. The Commission did give consideration to a scheme whereby unsuccessful enforcement creditors too would be provided with some compensation for their efforts. However, for two reasons, we decided that such a scheme was impracticable. First, unsuccessful measures may have been taken unreasonably or they may have been taken with some oblique motive in mind. In such circumstances, the unsuccessful enforcement creditor hardly seems deserving of protection. Secondly, although an unsuccessful enforcement creditor who acts reasonably and in good faith may deserve protection, we have concluded that it would be administratively cumbersome and inefficient to hold up the distribution of enforcement proceeds while it is determined whether the creditor's actions should be the subject of compensation.

Insofar as the extent of the priority is concerned, we first would point out that we do not believe that enforcement proceedings should give rise to any priority regarding the taxed costs of the action leading to the judgment that is being enforced against the debtor. One has nothing to do with the other. We wish to make clear, however, that we are not suggesting that a creditor's taxed costs should not be added to the judgment for all purposes of enforcement and *pro rata* distribution. Rather, we are saying that enforcement ought not to be available as a means of securing a position of priority over other creditors in respect of taxed costs. In this view, we are supported by the Law Reform Division of the New Brunswick Department of Justice.[283]

Apart from the present provision giving a priority for taxed costs, there are, in our opinion, two ways in which the present priority provisions are inadequate. First, we think that the priority should extend to all reasonable out-of-pocket expenses incurred by the creditor in the course of enforcement proceedings as determined by the enforcement office. Secondly, given the fact that enforcement creditors frequently must obtain legal advice or assistance regarding enforcement proceedings, the law should ensure that creditors are provided with at least a partial indemnifi-

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creditor would be entitled to recover his "costs of the execution" from the proceeds for which he is responsible prior to the distribution of the proceeds pursuant to section 26 of the Act.

[282] See s. 58(1) of the proposed *Money Judgments Enforcement Act, 1975*, contained in the New South Wales Report, *supra*, note 146, at 93.

[283] See New Brunswick Report, *supra*, note 147, at 30 (emphasis deleted):

> It is recommended that the priority of one bill of costs under the *Creditors Relief Act* be abolished to avoid any incentive to precipitous action by a creditor and to remove any question as to which creditor is entitled, or alternatively that the priority be fixed upon the first creditor to deliver a writ of *fi.fa.* to the sheriff, unless otherwise ordered by the County Court.

cation for legal costs so incurred. To avoid any complexity in the calculation of the amount to which each instructing creditor should be entitled, we propose that this amount should be prescribed by regulation. Priority in respect of these two sums would minimize the supposed disincentive effect of a creditors' relief regime.

Accordingly, the Commission makes the following recommendations with respect to the right of instructing creditors to a costs priority. All creditors who instruct the enforcement office to take active enforcement measures against their debtors, if the measures are successful, should be entitled to a priority over all other creditors, including maintenance creditors and wage creditors, in respect of the costs of enforcement, that is to say, the creditor's reasonable out-of-pocket expenses as determined by the enforcement office, together with a fee, prescribed by regulation, for any legal expenses incurred as a result. In addition, an enforcement creditor should be entitled to add the taxed costs of his action against the debtor to the judgment debt for all purposes of enforcement and *pro rata* distribution. We further recommend that, contrary to sections 5(2) and 26 of the *Creditors' Relief Act*, no creditor should be entitled to a priority in respect of his taxed costs.

(ii) The Costs of Attaching and Impeaching Creditors

In an earlier section of this chapter, we considered whether non-judgment creditors who have preserved some of their debtors' property for enforcement purposes should be entitled to share in a distribution of the proceeds representing such property. We concluded that, although under the revised *Creditors' Relief Act* non-judgment creditors would generally not be entitled to share in the distribution of enforcement proceeds, an exception ought to be made in the case of creditors who have successfully attached some of their debtors' property before judgment and non-judgment creditors who have succeeded in impeaching some voidable transaction by their debtor.[284]

We believe that such creditors should not only be entitled to share in a distribution of proceeds from property saved for the debtors' creditors by their efforts, but they should also be entitled to recover from the proceeds the amounts expended by them in securing their debtors' property before any money is distributed. In our opinion, it is only fair and equitable that a creditor who has attached some of his debtor's property[285] or impeached some transaction by his debtor should be compensated for the costs he has incurred as a result; other creditors entitled to share in proceeds representing attached property or property that has been the subject of a voidable transaction suit should not benefit at the expense of an attaching or impeaching creditor. Accordingly, the Commission recommends that, before proceeds of attached property or property that has been the subject of a successful voidable transaction suit are distributed, the attaching creditor or the impeaching creditor, as the case may be, should be reimbursed

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[284] See *supra*, this ch., sec. 6(b)(i).

[285] See now s. 21(1) of the *Creditors' Relief Act*, *supra*, note 2.

for all reasonable and necessary expenses incurred by him in preserving the debtor's property.

(iii) Adverse Claims and Interpleader Proceedings

In chapter 5 of Part II of our *Report on the Enforcement of Judgment Debts and Related Matters*, we discussed in great detail the law relating to interpleader proceedings. We there considered, *inter alia*, the issue of the distribution of enforcement proceeds realized as a result of such proceedings, and recommended that section 5(4) of the *Creditors' Relief Act* should be retained.[286] As a result, only those creditors "who are parties [to the interpleader proceedings] and who agree to contribute *pro rata* in proportion to the amount of the executions . . . to the expense of contesting any adverse claim" would be entitled to share in any benefit secured thereby. While this scheme may be seen as an exception to the principle of rateable distribution behind a revised *Creditors' Relief Act*, we believe that interpleader proceedings are sufficiently unique to justify such a minor departure from this principle.

(iv) Supervening Security Interests

Earlier in this chapter,[287] we outlined the history and the effect of section 32(11) and (12) of the *Creditors' Relief Act*. In short, while introduced to guarantee, in principle, rateable distribution of proceeds of enforcement among execution creditors despite the existence of a supervening security interest, the provisions seem to have been ignored by the courts. This attitude on the part of the courts perhaps can be explained by the cryptic language of the provisions. On the other hand, it is possible that the courts are uncomfortable with the results achieved by the application of subsections (11) and (12) of section 32 of the *Creditors' Relief Act*.

Dunlop, in his text on creditor-debtor law, illustrated the effect of the common law and the statutory provisions with the following hypothetical example:[288]

> Creditor A obtains judgment for $400 and issues a writ of execution for the same amount, pursuant to which the sheriff seizes a chattel belonging to the debtor. The chattel is left in the possession of the debtor on a bailee's undertaking. Before sale of the chattel by the sheriff, the debtor grants to B a chattel mortgage on the chattel to secure a loan of $400. Thereafter, either before the sheriff's sale of the chattel or after the sale but within one month of its date, creditor C files with the sheriff a writ of execution in the amount of $400. The proceeds of the sheriff's sale of the chattel are $600.

Under the common law, Dunlop explained, "out of the proceeds of $600 from the sheriff's sale, creditor A would get $400 and secured creditor B would get $200. Creditor C would get nothing."[289] Turning to the effect of section 32(11) and (12), Dunlop described the result as follows:[290]

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[286] Commission Report, *supra*, note 1, Part II, at 276.

[287] See discussion *supra*, this ch., sec. 4(b)(i)h.

[288] See Dunlop, *supra*, note 4, at 438.

[289] *Ibid.*, at 440.

[290] *Ibid.*, at 441.

> The law requires the sheriff to permit creditors, whether before or after the chattel mortgage, to 'share' in the distribution. The sheriff starts therefore by allotting $300 to A and $300 to C. However, the section goes on to say that the dividends allotted to subsequent creditors are not paid to them but are instead paid to 'the person entitled thereto', *i.e.*, the secured creditor B. The result is that A gets $300 and B gets $300. C gets nothing.

Dunlop criticized this result because it "increase[s] B's share at the expense of A without helping C for whose benefit the amendment may have been passed".[291]

As an alternative to the common law approach and that required by section 32(11) and (12), Dunlop suggested that the prior execution creditor should continue to enjoy a priority over the subsequent mortgagee, but that the prior execution creditor should be required to share the proceeds *pro rata* with the subsequent execution creditors. Using the hypothetical set out above, the result would be that A, B, and C would each be entitled to receive $200.[292]

In our view, the approach suggested by Dunlop is to be preferred to either the common law position or that now enshrined in the *Creditors' Relief Act*. The common law approach ignores the direction in section 3 of the Act that priority among execution creditors is abolished. The approach in the present Act, as Dunlop has pointed out, rewards the mortgagee at the expense of the prior execution creditor. Dunlop's approach, on the other hand, ensures rateable distribution among execution creditors, while giving the supervening secured creditor no greater benefit than he would expect. We would note that the solution advocated by Dunlop is the one that has been adopted in another, analogous context, that is, where there is a supervening security interest and a number of mechanics' liens.[293]

Accordingly, the Commission recommends that section 32(11) and (12) of the *Creditors' Relief Act* should be repealed and replaced by a provision to the effect that, where property of a debtor that is subject to a writ of enforcement is mortgaged or charged, any subsequent execution creditor should be entitled to share *pro rata* with the prior execution creditor any proceeds of enforcement to which the latter is entitled.

(g) Distribution of Proceeds of Enforcement: The Procedure

The course that a sheriff in receipt of enforcement proceeds is now required to follow is found in sections 32 to 35 of the *Creditors' Relief Act*, and has been described earlier.[294] We are satisfied that the present procedure for the distribution of proceeds of enforcement is operating satisfactorily, and therefore does not need to be amended in any substantial way.

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[291] *Ibid.*

[292] *Ibid.*, at 440.

[293] See, for example, *Waynco Ltd. v. Terrace Manor Ltd.* (1981), 127 D.L.R. (3d) 142, 39 C.B.R. (N.S.) 203 (Ont. Div. Ct.).

[294] See *supra*, this ch., sec. 4(a).

However, the Commission believes that, with one or two minor changes, the procedure can be made more efficacious. At this juncture, it may be useful again to describe briefly the existing procedure.

In any case where the money in the sheriff's hands is not sufficient to pay all claims in full, section 32(1) of the *Creditors' Relief Act* provides that the sheriff shall first prepare for examination by the debtor and his creditors a "list of the creditors entitled to share in the distribution with the amount due to each for principal, interest and costs". The word "creditors" in this section must refer to those execution and certificate creditors entitled to share in a distribution of enforcement proceeds in accordance with section 5(2) of the Act, and not all the debtor's creditors. Under section 32(2) of the Act, a copy of the distribution list is required to be delivered or sent by registered mail to each creditor or his solicitor. Creditors are given eight days from the date of delivery or mailing of the copies of the distribution list within which to file an objection.[295]

Where no objection is filed, the sheriff is free to distribute the enforcement proceeds on hand in accordance with the distribution list.[296] Where an objection is filed, the sheriff still may distribute the proceeds, but he may do so only to the extent that it does not "interfere with the effect of the objection in case it should be allowed".[297] An objection must be in writing and must state the grounds for the objection.[298] The objecting creditor, the "contestant", must apply to a judge under section 32(6) "for an order adjudicating upon the matter in dispute". The contestant has eight days within which to make the application; failure to do so will result in the objection being treated as abandoned.[299] Upon obtaining "an appointment for hearing and determining the matter in dispute", a copy of the appointment and a "Notice of Contestation of Scheme of Distribution" must be served on the debtor and the creditors by the contesting creditor.[300]

Regarding the procedure for the determination of an objection to the scheme of distribution, section 32(9) states that the judge may decide "any question in dispute in a summary manner, or may direct an action to be brought or an issue to be tried with or without a jury in any court". To simplify the proceedings, the judge may give "such directions for saving the expense of an unnecessary number of parties and trials, and of unnecessary proceedings, as he considers just".[301] The judge also is given broad powers in respect of the costs of any such proceedings: he may direct "by whom and in what proportions any cost incurred in the contestation, or in any proceedings thereunder, shall be paid, and whether any and what costs shall be paid out of the money levied".[302] A right of appeal to the

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[295] *Creditors' Relief Act*, *supra*, note 2, s. 32(3) and (5).

[296] *Ibid.*, s. 32(3).

[297] *Ibid.*, s. 32(4).

[298] *Ibid.*, s. 32(5).

[299] *Ibid.*, s. 32(6).

[300] *Ibid.*, s. 32(8).

[301] *Ibid.*, s. 33.

[302] *Ibid.*

Divisional Court is given by the *Creditors' Relief Act* in respect of any question involving a sum greater than $100.[303]

As we stated earlier, the procedure to be followed for the distribution of proceeds of enforcement is, for the most part, quite satisfactory. It allows all those entitled to share in any distribution to ensure that the principle of rateable distribution is adhered to, and that those creditors entitled to priority are accorded preferential treatment. Given the Commission's recommendations regarding maintenance creditors and wage creditors, the latter will be particularly important in any revised *Creditors' Relief Act*. Therefore, the Commission recommends that, subject to the changes proposed below, the present procedure for the distribution of proceeds of enforcement contained in the existing *Creditors' Relief Act* should be retained. Accordingly, upon the receipt of enforcement proceeds, the enforcement office would be required to prepare a distribution list like the one required to be prepared and delivered under section 32 of the present *Creditors' Relief Act*.

However, we do not see any need for distribution lists to be delivered or sent by registered mail, as is now the case under section 32(2) of the Act. In our view, the use of registered mail in this context is wasteful. Elsewhere in our *Report on the Enforcement of Judgment Debts and Related Matters*, we proposed that service of documents should be effected by ordinary mail.[304] We see no reason to depart from this general philosophy in the case of distribution lists. Therefore, we recommend that a copy of the distribution list should be required to be sent by ordinary prepaid mail to the debtor and to each creditor (or his solicitor) entitled to share in the proceeds in question. It should be noted that, under this recommendation, the enforcement office would be required to send a copy of the distribution list to the debtor, a requirement not now found in section 32 of the *Creditors' Relief Act*.

One of the practical problems that sheriffs administering the *Creditors' Relief Act* must deal with is the possibility that a creditor to whom a share of enforcement proceeds has been assigned may have had his judgment debt satisfied in whole or in part as a result of a private payment from his debtor or a third person. In such a case, the distribution list prepared by the sheriff will be inaccurate, and the creditor in question may receive a larger dividend than he otherwise would be entitled to receive. As the Commission has not proposed that such private payments should be prohibited,[305] this administrative problem could continue to plague sheriffs under the revised *Creditors' Relief Act*.[306]

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[303] *Ibid.*, s. 38.

[304] See, for example, Commission Report, *supra*, note 1, Part II, at 206.

[305] *Supra*, this ch., sec. 6(a)(i).

[306] Even if private payments were prohibited, the situation under consideration still could arise, since a creditor might be prepared to accept payment of his judgment debt in contravention of any such prohibition. This possiblity was addressed expressly in the draft *Money Judgments Enforcement Act, 1975* proposed by the New South Wales Law Reform Commission: see New South Wales Report, *supra*, note 146, at 41.

We, therefore, make the following recommendations. First, it is recommended that, where the amount shown on a distribution list as owing to a creditor is greater than the amount actually owing, that creditor should be under a statutory obligation to advise the enforcement office, no later than fifteen days from receipt of the list, of the amount that actually is owed to him by the debtor pursuant to the judgment. Secondly, in order to ensure compliance with the statutory duty proposed above, we recommend that a creditor who fails to comply should be subject to a fine equal to twice the difference between the amount shown as owing on the distribution list and the amount actually owing to the creditor pursuant to the judgment, and that this fine should be distributed to the other creditors of the debtor entitled to a share of any proceeds of enforcement. While we recognize that such a fine may be viewed as Draconian, in our view it is the only viable solution to the problem of non-disclosure. To require a creditor who fails to disclose an error in his favour on the distribution list simply to pay back any excess would do little to encourage compliance with the proposed duty of disclosure.

Insofar as the actual distribution of proceeds of enforcement is concerned, with one exception, distribution should take place fifteen days after the mailing of the distribution list if no objection to the list is received within such time. Where a timely objection is filed, distribution should be made in accordance with provisions similar to subsections (4) and (10) of section 32 of the present *Creditors' Relief Act*, which read as follows:

> 32.-(4) If objection is made, the sheriff shall forthwith distribute rateably so much of the money made, and among such persons, as will not interfere with the effect of the objection in case it should be allowed.
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> (10) Where a claimant is held to be not entitled or to be entitled to part only of his claim, the money retained pending the contestation or the portion as to which the claimant has failed shall be distributed among the creditors who would have been entitled to it as it would have been distributed had the claim in respect thereof not been made.

The one exception referred to above concerns the distribution of small shares of enforcement proceeds. From the evidence available to us, it would appear that nearly fifty percent of all dividends are for an amount equal to or less than $50, with a quarter of all dividends being for a sum less than $20.[307] The administrative costs of such distributions are disproportionately high, and one way in which this difficulty might be ameliorated would be to empower the enforcement office to withhold small dividends for a certain period of time. The enforcement office may know, for example, that additional proceeds of enforcement will likely be received; therefore, a number of dividends to the same creditor could be combined, with a resultant saving in administrative costs. While such an approach entails some prejudice to the small creditor, we believe that it is justified, particularly since we have done away with the one month grace period under the present *Creditors' Relief Act*.[308] In the absence of a right

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[307] These figures were obtained by the Commission as a result of its examination of the operation of the *Creditors' Relief Act* in 1977 in the Judicial District of York.

[308] See discussion *supra*, this ch., sec. 6(b)(iii).

to withhold small dividends, it is possible to foresee cases in which an enforcement office would receive proceeds of enforcement many times in a short period, entailing a great many distributions of perhaps insignificant amounts. Therefore, the Commission recommends that the enforcement office should be empowered to withhold any dividend that is less than $50 until the creditor's share of the debtor's assets totals $50, or for a period of three months, whichever comes first.

Before we leave the topic of the procedure for the distribution of proceeds of enforcement, the Commission would like to comment briefly on the right of creditors to object to the distribution list setting out the dividend to which each creditor is entitled. Given our recommendation to require creditors entitled to a dividend to disclose receipt of any private payment,[309] we believe that objections should be reduced significantly. Nevertheless, we recognize the need for some dispute resolution procedure for situations where a creditor has failed to advise the enforcement office of a private payment, or where the enforcement office has made some error in calculating the dividends payable under a particular distribution. In our view, the present procedure, contained in sections 32 to 35 of the *Creditors' Relief Act* and described above is, with one modification, adequate to the task.

The single modification to this procedure is necessitated by an earlier recommendation of the Commission to permit certain non-judgment creditors to share in any distribution of enforcement proceeds. In a preceding section of this chapter,[310] we recommended that non-judgment creditors who were entitled to participate in an orderly payment of debts arrangement should be entitled to share in a distribution of enforcement proceeds that takes place after an annulment of the arrangement. Because it is possible that only some of the other creditors entitled to share in such a distribution would have been able to contest the non-judgment creditor's claim made in the course of the orderly payment of debts arrangement – that is to say, those creditors with admissible claims[311] – we believe that those creditors who would have been unable to contest the claim (those with inadmissible claims) should be entitled to do so. We see no need to provide creditors who have already had such an opportunity in the context of an arrangement with the same right; otherwise, we would be giving creditors who participated in the annulled arrangement a second chance to prevent the non-judgment creditor from sharing in the debtor's assets, with resultant delay and unnecessary expense for all concerned.

Accordingly, we recommend that the present procedure for objecting to a distribution list, outlined in sections 32 to 35 of the *Creditors' Relief Act*, should continue to be available under revised creditors' relief legislation; however, only those creditors entitled to share in the distribution who have not had an opportunity to contest the validity of the claim of a non-judgment creditor in an orderly payment of debts arrangement that

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[309] *Supra*, this sec.

[310] *Supra*, this ch., sec. 6(b)(i).

[311] See Commission Report, *supra*, note 1, Part I, at 23-27.

subsequently has been annulled should be entitled to contest the claim at this stage.

(h) County-Wide Versus Province-Wide Distribution of Enforcement Proceeds

In chapter 3 of Part I of the Commission's *Report on the Enforcement of Judgment Debts and Related Matters*,[312] we considered the question whether enforcement of judgment debts should be on a province-wide basis, as opposed to the present system of county-wide enforcement. Although we there proposed some movement toward province-wide enforcement,[313] we nevertheless recommended that the county continue to be the basic unit for most purposes of enforcement, particularly those concerned with administration.

Given these earlier proposals, the Commission is of the view that it would be inconsistent to propose at this time that the distribution of enforcement proceeds take place on a province-wide basis. Moreover, until the creation of a province-wide register of enforcement activities,[314] province-wide distribution would be, from a practical viewpoint, quite unwieldy. Whenever enforcement proceeds were available for distribution, inquiries would have to be made in the enforcement office in each county to determine those creditors entitled to share in the proceeds. Consequently, we propose no change in the present county-wide distribution scheme. However, this is a matter that, in our opinion, should be reviewed once a province-wide register of enforcement activities is in place, and we so recommend.

Recommendations

The Commission makes the following recommendations:

1. The *Creditors' Relief Act* should be retained, but it should be amended substantially to eliminate the inequities and deficiencies of the present Act.

2. Subject to Recommendation 5, all proceeds realized as a result of enforcement activity should be distributed in accordance with the revised *Creditors' Relief Act*, irrespective of the method of enforcement employed and regardless of whether the judgment being enforced emanated from the Supreme Court, a county or district court, or a small claims court.

3. Once enforcement proceedings have been initiated against the debtor, all payments made to the sheriff, either by the judgment debtor or by a third person on his behalf, should be distributed in accordance with the revised *Creditors' Relief Act*.

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[312] *Ibid.*, at 77-78 and 115-18.

[313] For example, we proposed the establishment of an office of Provincial Director of Enforcement and the creation of a province-wide register of enforcement activities.

[314] See Commission Report, *supra*, note 1, Part I, at 149-51.

4. Private payments to a creditor by a debtor or a third person on the debtor's behalf should not be proscribed by the revised *Creditors' Relief Act*.

5. Proceeds of enforcement activity for which a maintenance creditor is responsible should not be required to be distributed pursuant to the revised *Creditors' Relief Act*, irrespective of whether the enforcement measures adopted are those for which the provincial court (family division) would be responsible or those that would come under the aegis of the enforcement office.

6. Subject to Recommendations 7-9, non-judgment creditors should not have a right to participate in a distribution under the revised *Creditors' Relief Act*; accordingly, the present certificate procedure should not be included in any revised Act.

7. A non-judgment creditor whose claim has been approved under an orderly payment of debts arrangement (see Part I, chapter 2) that has been annulled should be entitled to share *pro rata* in a distribution of proceeds under the revised *Creditors' Relief Act*.

8. A non-judgment creditor who attaches his debtor's property prior to judgment should be entitled to share *pro rata* in the proceeds realized from property that he has had attached, but his share should not be distributed to him until he has obtained judgment. The court, upon application, should determine the manner in which an attaching creditor should share, having regard to all relevant circumstances, including the nature of the attaching creditor's claim and the time before judgment likely will be given in the main action.

9. A non-judgment creditor who successfully impeaches a fraudulent conveyance or fraudulent preference should be entitled to share *pro rata* in any distribution of proceeds realized as a result thereof. The court, upon application, should determine the manner in which an impeaching creditor should share, having regard to all relevant circumstances, including the nature of the impeaching creditor's claim and the time before judgment likely will be given in the main action.

10. Subject to Recommendation 11, all creditors who deliver a writ of enforcement to the new enforcement office should be entitled to share in any distribution of enforcement proceeds made pursuant to the revised Act, regardless of the method of enforcement employed.

11. The existing one month grace period under the present *Creditors' Relief Act* should be abolished; accordingly, only those creditors who have delivered a writ of enforcement to the enforcement office by the time proceeds of enforcement are realized should be entitled to share therein.

12. (1) Maintenance creditors who file a writ of enforcement with the enforcement office should be entitled to be paid in full in priority to all other creditors under the revised *Creditors' Relief Act*.

(2) For the purposes of Recommendation 12(1), maintenance creditors should be defined to include not only persons with a support or maintenance order in their favour, but also creditors who have obtained a money judgment based on the support or maintenance provisions of a cohabitation agreement, marriage contract, separation agreement, or paternity agreement, as defined by the *Family Law Reform Act*.

(3) To preclude the use of bankruptcy proceedings to circumvent the priority proposed in Recommendation 12(1), the Parliament of Canada should be urged to give effect to the principle of a maintenance creditor's priority in any new bankruptcy legislation.

(4) The register of maintenance judgment debts, which the enforcement office would be required to establish and maintain under an earlier recommendation (see Part I, Recommendation 111) should be a public register.

13. (1) Subject to Recommendation 12, wage creditors should be entitled to priority over all other enforcement creditors in respect of three months unpaid wages under the revised *Creditors' Relief Act*.

(2) In all other respects, the wage creditor's priority should be similar to that contained in section 14 of the *Employment Standards Act*. Accordingly,

(a) to claim this priority, a wage creditor should not have to show that he was in the debtor's employ at the time of seizure or within one month prior thereto; rather, he should be required to show simply that he is owed a specific amount by the debtor for unpaid wages;

(b) for the purposes of this Recommendation, "wages" should be defined as in section 1(*p*) of the *Employment Standards Act*; and

(c) a wage creditor should be able to establish his entitlement to a priority in respect of any proceeds of enforcement by filing with the enforcement office a writ of enforcement or a certificate of unpaid wages issued pursuant to the *Employment Standards Act*.

14. (1) Subject to Recommendation 14(2), proceeds of enforcement should be distributed rateably among creditors in the same category in the case of both maintenance creditors and wage creditors.

(2) The provincial courts (family division) should be empowered to impose some scheme of distribution other than rateable distribution upon maintenance creditors, where it considers it just and equitable to do so.

15. The right of the provincial Crown to be preferred over creditors with debts of equal degree in any distribution of enforcement proceeds should be abolished.

16. The Parliament of Canada should be asked to abolish the federal Crown's royal prerogative to priority.

17. Subject to the interim proposals contained in Recommendations 18, 19, and 20, statutory and common law liens and charges should be the subject of a separate in-depth study.

18. Liens against specific parcels of land should be effective only if and from the time they are registered against such parcels.

19. Liens that may be enforced through the municipal tax lien should be enforceable only if the amount in question is added specifically to the collector rolls.

20. (1) A non-possessory lien or charge against personal property should bind the property only until sold, and the proceeds therefrom only until distributed to those enforcement creditors entitled to receive a share of the proceeds.

(2) A purchaser of personal property sold by the enforcement office should take it free and clear of any non-possessory lien or charge unless, prior to the sale, a valid claim has been filed with the enforcement office.

21. (1) All creditors who instruct the enforcement office to take active enforcement measures against their debtors, if the measures are successful, should be entitled to a priority over all other creditors, including maintenance creditors and wage creditors, in respect of the costs of enforcement, that is to say, the creditors' reasonable out-of-pocket expenses as determined by the enforcement office, together with a fee, prescribed by regulation, for any legal expenses incurred as a result.

(2) An enforcement creditor should be able to add the taxed costs of his action against the debtor to the judgment debt for all purposes of enforcement and *pro rata* distribution.

(3) Contrary to sections 5(2) and 26 of the present *Creditors' Relief Act*, no creditor should be entitled to a priority in respect of his taxed costs.

22. Before proceeds of attached property or of property that has been the subject of a successful voidable transaction suit are distributed, the attaching creditor or the impeaching creditor, as the case may be, should be reimbursed for all reasonable and necessary expenses incurred by him in preserving the debtor's property.

23. Section 32(11) and (12) of the present *Creditors' Relief Act* should be repealed and replaced by a provision to the effect that, where property of a debtor that is subject to a writ of enforcement is mortgaged or

charged, any subsequent execution creditor should be entitled to share *pro rata* with the prior execution creditor any proceeds of enforcement to which the latter is entitled.

24. The procedure for the distribution of proceeds of enforcement contained in the present *Creditors' Relief Act* should be retained, subject to the following changes:

    (a) A copy of the distribution list should be required to be sent, by ordinary prepaid mail rather than by registered mail, to the debtor and to each creditor (or his solicitor) entitled to share in the proceeds in question.

    (b) Where the amount shown on a distribution list as owing to a creditor is greater than the amount actually owing, the creditor should be under a statutory obligation to advise the enforcement office, no later than fifteen days from the receipt of the list, of the amount that actually is owed to him by the debtor pursuant to the judgment, and a creditor who fails to comply with this statutory duty should be subject to a fine equal to twice the difference between the amount shown as owing on the distribution list and the amount actually owing to the creditor pursuant to the judgment, and this fine should be distributed to the other creditors of the debtor entitled to a share of any proceeds of enforcement.

    (c) Subject to the following Recommendation, distribution should take place fifteen days after the mailing of the distribution list if no objection to the list is received within such time. Where a timely objection is filed, distribution should be made in accordance with provisions similar to subsections (4) and (10) of section 32 of the present *Creditors' Relief Act*.

    (d) The enforcement office should be empowered to withhold any dividend that is less that $50 until the creditor's share of the debtor's assets totals $50, or for a period of three months, whichever comes first.

    (e) The present procedure for the resolution of disputes, contained in sections 32 to 35 of the *Creditors' Relief Act*, should be retained; however, only those creditors entitled to share in a distribution who have not had an opportunity to contest the validity of the claim of a non-judgment creditor in an orderly payment of debts arrangement that subsequently has been annulled (see Recommendation 7) should be entitled to contest the claim at this stage.

25. Distribution of enforcement proceeds should continue to be made on a county-wide basis. This Recommendation should be reviewed, however, once a province-wide register of enforcement activities is in place (see Part I, Recommendation 149).

CHAPTER 3

POSTJUDGMENT ARREST

1. INTRODUCTION

In its review of the law relating to prejudgment enforcement remedies, the Commission considered, *inter alia*, whether arrest and imprisonment of the debtor should continue to be available to a creditor before judgment. The Commission concluded that, given its recommendations for prejudgment attachment of a debtor's property, retention of the remedy of prejudgment arrest and imprisonment could no longer be justified. Accordingly, the Commission proposed the repeal of the prejudgment arrest provisions of the *Fraudulent Debtors Arrest Act*.[1] The Commission decided, however, to recommend the retention of the remedy of prejudgment arrest authorized by section 24 of the *Family Law Reform Act*.[2] We now turn to consider to what extent arrest and imprisonment of a debtor for non-payment of a money judgment should be available as a remedy to creditors after judgment.

In answering this question, it is important to keep in mind a general outline of the new enforcement regime proposed by the Commission. In particular, it should be recalled that, as a result of the Commission's recommendations, enforcement of judgment debts would be greatly facilitated. All the property of a debtor, except that expressly exempted from enforcement, would be available to satisfy the debtor's outstanding judgment debts.[3] Such remedies as garnishment and receivership would be much more effective.[4] In addition, many fraudulent dealings by a debtor with his property would be prevented by the Commission's proposals respecting prejudgment attachment,[5] or at least made much more difficult as a result of the recommendations[6] for reform of the law of voidable transactions, now governed by the *Fraudulent Conveyances Act*[7] and the *Assignments and Preferences Act*.[8] It is in this context that the Commission

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[1] *Fraudulent Debtors Arrest Act*, R.S.O. 1980, c. 177. See Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters* (hereinafter referred to as "Commission Report"), Part IV (1983), ch. 2, sec. 7(a).

[2] *Family Law Reform Act*, R.S.O. 1980, c. 102. See Commission Report, *supra*, note 1, Part IV (1983), ch. 2, sec. 7(a).

[3] See, for example, Commission Report, *supra*, note 1, Part II (1981), at 79-106 and 153-87.

[4] *Ibid.*, chs. 3 and 4.

[5] See Commission Report, *supra*, note 1, Part IV (1983), ch. 2.

[6] *Ibid.*, ch. 3.

[7] R.S.O. 1980, c. 176.

[8] R.S.O. 1980, c. 33.

has had to consider whether postjudgment arrest of the debtor for non-payment of a money judgment is still necessary and, if so, in what circumstances this remedy should be available to a judgment creditor.

We wish to make clear at the outset that our recommendations for reform of this important area of enforcement law are animated by a concern that the judgments and orders of Ontario courts not be thwarted or frustrated by the actions of debtors seeking to avoid payment of their just debts. In those circumstances in which we believe postjudgment arrest and imprisonment has a useful role to play, it is as an enforcement remedy, not as a method of punishing the debtor for his conduct, that we recommend the remedy be employed. In no way do we intend this ultimate enforcement sanction to be used against those who do not have the means to pay their debts; our recommendations will make clear that this remedy is reserved for those with an ability to pay and who, by their refusal to pay or by their other actions, have shown their contempt for the judicial process. While there are always dangers in the use of arrest and imprisonment powers, we believe that the restrictions on the remedy proposed in this chapter, as well as the procedural safeguards that we advocate, should guarantee that any such dangers are reduced to a minimum.

We begin our discussion of postjudgment arrest and imprisonment with a brief history of its development.

2. POSTJUDGMENT ARREST AND IMPRISONMENT IN HISTORICAL PERSPECTIVE

While the law respecting the arrest and imprisonment of debtors in Ontario is now based entirely on statute, the common law origins of this remedy should be mentioned briefly. At common law, the appearance of a defendant in an action could be secured by his arrest pursuant to a writ of *capias ad respondendum* (*ca.re.*), and this soon became the preferred method of commencing an action.[9] Beginning in the early part of the fourteenth century, it was decided "that when a writ of *capias ad respondendum* lay to get the defendant before the court, a writ of *capias ad satisfaciendum* (*ca.sa.*) would lie to obtain execution of the judgment".[10] In other words, at common law, prejudgment arrest of a debtor could be secured by the writ of *capias ad respondendum* and postjudgment arrest was possible by means of the writ of *capias ad satisfaciendum*.

In Upper Canada, the first restriction on the remedy of postjudgment arrest was introduced in 1858. Section 1 of *The Act for the abolition of*

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[9] See Sutherland, "Mesne Process upon Personal Actions in the Early Common Law" (1966), 82 L.Q. Rev. 482. For a history of the remedies of prejudgment and postjudgment arrest, see, also, Morris and Wiener, "Civil Arrest: A Medieval Anachronism" (1976-77), 43 Brooklyn L. Rev. 383; Freedman, "Imprisonment for Debt" (1927-28), 2 Temple L.Q. 330; Note, "Arrest and Attachment", [1960] U. Ill. L.F. 141; Ford, "Imprisonment for Debt" (1926-27), 25 Mich. L. Rev. 24; and Dunlop, *Creditor-Debtor Law in Canada* (1981), at 93-98.

[10] Holdsworth, *A History of English Law* (2d ed. rep., 1966), Vol. VIII, at 231.

Imprisonment for debt[11] stated that, after September 1, 1858, "no person shall be arrested upon mesne [prejudgment] or final process in any civil action in any of Her Majesty's Courts in Upper Canada", except as provided by the Act. The Act specified the following situations in which arrest of a debtor was still available as an enforcement remedy:[12]

1. where "there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Canada with intent to defeat his creditors generally or the said party or plaintiff in particular"; and

2. where the defendant "hath parted with his property or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution".

The Act found its way into the 1859 Consolidated Statutes of Upper Canada as *An Act respecting Arrest and Imprisonment for Debt*.[13] This legislation should be read in conjunction with *The Indigent Debtor's Act*.[14] Under the latter statute, a debtor under arrest could secure his release by establishing "[t]hat he is unable to find security for the limits" of the bond for his release and "is not worth the sum of five pounds".[15] *The Indigent Debtor's Act* and *An Act respecting Arrest and Imprisonment for Debt* formed the basis of *The Fraudulent Debtors Arrest Act*,[16] which was first introduced in 1909. Since that time, the Act has remained basically the same.

Imprisonment for debt was abolished in England in 1869 except in those circumstances outlined in *The Debtors Act, 1869*.[17] We need not concern ourselves here with all the exceptions prescribed by this Act. Suffice it to say that, under section 5, postjudgment arrest was preserved in the case of money judgments "where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same".

Postjudgment arrest in England was further circumscribed by the *Administration of Justice Act 1970*.[18] Section 11 of this Act provides that the jurisdiction given by section 5 of *The Debtors Act, 1869* to commit to prison a person who makes default in payment of a debt shall be exercisable only in respect of maintenance orders and, in the case of a county court, in respect of a judgment or order for the payment of certain taxes, contributions, and liabilities.[19]

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[11] 22 Vict., c. 96 (Can.).

[12] *Ibid.*, s. 6.

[13] C.S.U.C. 1859, c. 24.

[14] C.S.U.C. 1859, c. 26.

[15] *Ibid.*, s. 1.

[16] *The Fraudulent Debtors Arrest Act*, S.O. 1909, c. 50.

[17] *The Debtors Act, 1869*, 32 & 33 Vict., c. 62.

[18] C. 31.

[19] For the procedure to be followed to commit a debtor for non-payment of a maintenance order, see the English Rules of the Supreme Court 1965, Ord. 45, r. 5, and Ord. 52. For a brief discussion of the procedure, see Black, *Execution of a Judgment* (6th ed., 1979), at 88-91.

Having discussed briefly the historical development of postjudgment arrest and imprisonment, we turn to an examination of present debtor's arrest and imprisonment legislation.

3. POSTJUDGMENT ARREST AND IMPRISONMENT OTHER THAN IN THE FAMILY COURT: THE PRESENT ONTARIO POSITION

Arrest for the non-payment of money judgments in general is covered by the *Fraudulent Debtors Arrest Act*.[20] By virtue of section 12 of the Act, arrest for contempt for non-payment of a money judgment of the Supreme Court or a county or district court has been abolished. Section 12 provides as follows:

> 12. No person is liable to arrest for contempt for non-payment of any sum of money or of any costs, charges, or expenses payable by a judgment or order of the Supreme Court or of a judge thereof, or of a county court or of a judge thereof, and no person is liable to arrest for non-payment of costs.

As a result of this provision, the only postjudgment arrest power in respect of Supreme Court and county or district court money judgments is that specifically prescribed by the *Fraudulent Debtors Arrest Act*.

Section 27(1) of the Act provides that a judgment creditor is entitled to a writ of *capias ad satisfaciendum* without a court order "[w]here a defendant has been arrested [before judgment] and has given security . . . or is imprisoned or detained in custody in default of giving security". The writ must issue within fourteen days after the plaintiff has become entitled to enter final judgment.[21] A writ of *capias ad satisfaciendum* also may be obtained under section 27(2) where the debtor has not been arrested before judgment. To secure such an order, the judgment creditor must satisfy a judge of the Supreme Court or of a county or district court, as the case may be, of the following:

1) that judgment has been recovered against the defendant in an amount equal to or greater than $100, and

2) that there is good and probable cause for believing that

   (a) unless forthwith apprehended, the debtor is about to quit Ontario with intent to defraud his creditors generally or the applicant in particular, or

   (b) the debtor has parted with his property or made some secret or fraudulent conveyance of the property in order to prevent its being taken in execution.

Section 27(3) provides that every writ of *capias ad satisfaciendum* against a debtor remains in force for two months.

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[20] *Supra*, note 1.

[21] *Ibid.*, s. 27(1).

The *Fraudulent Debtors Arrest Act* contains a number of provisions dealing with the question of the debtor's right to secure his discharge. Section 49, for example, provides as follows:

> 49. A debtor in close custody in execution or on mesne process and a debtor arrested under a writ of *capias ad satisfaciendum*, though he is not in close custody but has given bail, may, after giving to the person at whose instance he is in close custody or has been so arrested ten days notice in writing of his intention to do so, apply to the court or a judge to be discharged.

This provision must be read in conjunction with sections 50 and 51(1) of the Act. Section 50 allows the judgment creditor to apply to the court or a judge for an order that the debtor be examined *viva voce* on oath. The purpose of such an examination would be to obtain information regarding the debtor's assets. Section 51(1) provides that the debtor's application for a discharge must be supported by an affidavit indicating "that he is not worth $20, exclusive of his goods and chattels exempt from seizure under execution", and that he has complied with any order made under section 50, or that no order has been made under that section.

Before leaving the subject of the debtor's right to be discharged from custody, reference should be made to two other sections of the *Fraudulent Debtors Arrest Act*. First, it should be noted that, pursuant to section 56, a judgment creditor may authorize the discharge of his debtor held under a writ of *capias ad satisfaciendum*. Secondly, under section 24(1) of the Act, "[a] person arrested upon an order for arrest may apply to the court or a judge for an order that he be discharged out of custody, and the court or judge, subject to appeal, may make such order thereon as seems just". This section and section 49, set out above, would seem to overlap. It has been suggested, however, that section 24 is available only to debtors arrested before judgment.[22] This interpretation would seem to be correct, since the section speaks of a person arrested under an *order* for arrest, rather than under a writ of *capias ad satisfaciendum*, used for the arrest of a debtor once judgment has been rendered against him.

Finally, reference should be made to section 57 of the *Fraudulent Debtors Arrest Act*, which provides as follows:

> 57. Neither the taking of a debtor in execution under a writ of *capias ad satisfaciendum* nor his imprisonment thereunder or under this Act nor his discharge from custody by the voluntary action of his creditor or under the powers conferred by this Act operates as a satisfaction or extinguishment of the debt or deprives the creditor of the right to take out execution or other process against the property of the debtor or to take any other proceeding against him in the same manner as if the debtor had not been taken in execution or discharged out of custody.

Before turning to consider postjudgment arrest powers in other jurisdictions, brief reference should be made to some of the provisions of the

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[22] 12 C.E.D. (Ont. 3rd), Execution, §301, at 58-153. See, also, s. 34(1) of the *Fraudulent Debtors Arrest Act*, *supra*, note 1, which would also appear to apply to prejudgment arrest.

Supreme Court of Ontario Rules of Practice[23] with respect to the arrest and imprisonment of a debtor. Rule 569 provides as follows:[24]

> 569. A judgment requiring any person to do an act, *other than the payment of money*, or to abstain from doing anything, may be enforced by attachment or by committal . . . .

This provision, like section 12 of the *Fraudulent Debtors Arrest Act*, clearly suggests that the only authority under which a debtor may be imprisoned for non-payment of a judgment debt is that Act. However, until the recent decision of the Court of Appeal for Ontario in *Cohen v. Cohen*,[25] where the Court held that there is no power to punish for contempt for non-compliance with a Supreme Court maintenance order, the correctness of this proposition was uncertain.

In a previous decision, *Re Kapis and Kapis*,[26] Wright J. had been asked to commit a maintenance debtor for non-payment of maintenance. The maintenance creditor sought to rely on the "inherent power in the Court to commit persons who failed to comply with alimony or maintenance orders",[27] a power "frequently sought from, and used by, the Judges in like cases".[28] Wright J. was of the view that the whole question of the power of the courts to commit for non-payment of a maintenance or support order was in need of review by the Court of Appeal for a number of reasons. First, he noted that the earlier decision of *Freedman v. Freedman*[29] denied that the courts had the power to commit a defendant for non-payment of interim alimony. Relying on earlier English authority,[30] cited to the Court in *Freedman v. Freedman*, Wright J. concluded that the *Freedman* case was "wrong and of sufficient importance to be considered in a higher Court".[31] Secondly, Wright J. concluded that Rule 569 of the Supreme Court of Ontario Rules of Practice and section 12 of the *Fraudulent Debtors Arrest Act*, prohibiting "arrest for contempt for non-payment of any sum of money", were not enacted with the defaulting maintenance debtor in mind.[32] Rather, the object of this legislation was "to prevent the imprisonment of persons for nonpayment of ordinary debts". Moreover, Mr. Justice Wright pointed out that, in the past, alimony and maintenance were not considered to be debts. Finally, Wright J. made reference to the fact that judges of the provincial court (family divi-

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[23] Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540 (hereinafter referred to as "Rules of Practice").

[24] Emphasis added.

[25] *Cohen v. Cohen* (1979), 10 R.F.L. (2d) 169 (Ont. C.A.).

[26] *Re Kapis and Kapis* (1977), 15 O.R. (2d) 772, 76 D.L.R. (3d) 950 (H.C.J.) (subsequent references are to 15 O.R. (2d)).

[27] *Ibid.*, at 774.

[28] *Ibid.*

[29] (1923), 25 O.W.N. 3 (H.C.J.).

[30] *Lynch v. Lynch* (1885), 10 P.D. 183, 34 W.R. 47, and *Bates v. Bates* (1888), 14 P.D. 17, 37 W.R. 230 (C.A.). See, also, *DeLossy v. DeLossy* (1890), 15 P.D. 115.

[31] *Supra*, note 26, at 778.

[32] *Ibid.*, at 777-78.

sion) were given the power to imprison a defaulting maintenance debtor by a number of statutes. His Lordship found it hard to conclude "that these powers were conferred on the Judges of the Provincial Courts (Family Division) without the Legislature recognizing that the respective Judges of the other courts have always had inherent or implied power to imprison for contempt for non-payment of alimony or maintenance ordered in orders or judgments of the Supreme Court of Ontario or the County or District Courts or of the Surrogate Courts".[33]

In reviewing the earlier English authorities cited in *Freedman*, Wright J. noted that imprisonment was based on the debtor's failure to provide security in accordance with the order of the court. If attachment could be ordered only for failure to comply with the security provision of a maintenance order, Mr. Justice Wright commented, "then orders to pay maintenance in family law cases in the Supreme Court and the County or District Courts should be reinforced by an order to give security for maintenance. This I propose to do in this and future cases, for the authority of the Court's orders must be maintained."[34]

In spite of the forceful arguments of Wright J. in *Re Kapis and Kapis*, the Court of Appeal for Ontario in the case of *Cohen v. Cohen*[35] concluded that the Supreme Court of Ontario has no inherent power "to commit to gaol for contempt of court for non-payment of a sum of money arising under a judgment, whether that judgment is for payment of maintenance or otherwise".[36] Interestingly, the judgment of Wright J. in *Re Kapis and Kapis* does not appear to have been cited to the Court; in any event, the case is not referred to in *Cohen v. Cohen*. As a result, one is left to wonder whether the Court of Appeal may yet come to a different conclusion on this question and whether the Court of Appeal would agree with Wright J. that imprisonment for non-payment of a sum characterized as security or for the non-delivery of a bond would be in contravention of section 12 of the *Fraudulent Debtors Arrest Act*.[37]

Finally, mention should be made of Rule 594 of the Supreme Court of Ontario Rules of Practice, which reads as follows:[38]

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[33] *Ibid.*, at 778.

[34] *Ibid.*, at 777.

[35] *Supra*, note 25.

[36] *Ibid.*, at 171. Steinberg U.F.C.J., in *Harris v. Harris* (1982), 37 O.R. (2d) 552 (U.F.C.), came to the same conclusion concerning the powers of a judge of the Unified Family Court acting other than pursuant to the *Family Law Reform Act*, R.S.O. 1980, c. 152.

[37] In the family law context, see, for example, s. 12(*b*) of the *Divorce Act*, R.S.C. 1970, c. D-8, and s. 19(1)(*k*) of the *Family Law Reform Act*, R.S.O. 1980, c. 152, which authorize the court to demand security for the payment of a maintenance order and support order, respectively.

[38] Emphasis added. A provision similar to r. 594 was introduced for the first time in 1858 (*The Act for the abolition of Imprisonment for debt*, 22 Vict., c. 96 (Can.), s. 13), and appeared in *An Act respecting Arrest and Imprisonment for Debt*, C.S.U.C. 1859, c. 24, s. 41. It became part of the rules of procedure in 1881: see *The Judicature Act*, 44 Vict., c. 5, Schedule, r. 369(*a*).

The Civil Procedure Revision Committee has proposed that a provision along the lines of r. 594 be included in the Proposed Rules of Civil Procedure. Rule 61.10(4) of the Proposed Rules reads as follows:

> 594. Where the judgment debtor does not attend [a judgment debtor examination], does not allege a sufficient excuse for not attending, or, if attending, refuses to disclose his property or his transactions, or does not make satisfactory answers respecting the same, or, *if it appears from such examination that he has concealed or made away with his property in order to defeat or defraud his creditors or any of them*, the court may order the debtor to be committed to the common jail of the county or district in which he resides for a term of not more than twelve months, or that a writ of *capias ad satisfaciendum* may be issued against the debtor, or, in case the debtor is at large upon bail, may make an order for his committal to close custody, and the sheriff, on due notice of the order, shall forthwith take the debtor and commit him to close custody until he obtains an order allowing him to go out of close custody, on giving the necessary bond in that behalf, or until he is otherwise discharged in due course of law.

What is particularly noteworthy about this provision is the fact that it empowers the court to order a debtor to be committed for a period of up to twelve months on the basis that "it appears . . . that he has concealed or made away with his property in order to defeat or defraud his creditors or any of them". It would seem that the Rule applies whether the conduct complained of took place before or after the debtor has become a judgment debtor. In its scope, the provision is similar to section 350(*a*) of the *Criminal Code*,[39] which provides as follows:

> 350. Every one who,
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> (*a*) with intent to defraud his creditors,
>
> (i) makes or causes to be made a gift, conveyance, assignment, sale, transfer or delivery of his property, or
>
> (ii) removes, conceals or disposes of any of his property,
>
> . . . .
>
> is guilty of an indictable offence and is liable to imprisonment for two years.

The constitutional validity of Rule 594, at least insofar as the court's power to commit a debtor who "has concealed or made away with his property in order to defeat or defraud his creditors or any of them" is concerned, has been questioned on the ground that the matter is one of criminal law and within the exclusive jurisdiction of Parliament.[40]

> 61.10.-(4) Where a judgment debtor neglects or refuses to attend for an examination under this rule or, where he attends and refuses to disclose his property or his transactions, or does not make satisfactory answers respecting the same or, if it appears from such examination that he concealed or disposed of his property in order to defraud his creditors or any of them, a judge may commit him for contempt.
>
> See Province of Ontario, Ministry of the Attorney General, Civil Procedure Revision Committee, untitled report (June 1980).

[39] R.S.C. 1970, c. C-34. See, also, s. 301 of the *Criminal Code*, which provides that "[e]very one who, for a fraudulent purpose, takes, obtains, removes or conceals anything is guilty of an indictable offence and is liable to imprisonment for two years".

[40] See discussion *infra*, this ch., sec. 8.

4. POSTJUDGMENT ARREST AND IMPRISONMENT FOR NON-PAYMENT OF JUDGMENTS OTHER THAN FOR SUPPORT OR MAINTENANCE: THE OTHER PROVINCES

Both Alberta[41] and Saskatchewan[42] have enacted legislation declaring that the Imperial *Debtors Act, 1869* is no longer in force in those provinces. While civil contempt proceedings are not available in Alberta for failure to pay a money judgment,[43] the same may not be true in Saskatchewan.[44] In Quebec, imprisonment in civil matters has been abolished, but not "in cases of contempt of court".[45]

Although a debtor in British Columbia can no longer be arrested and imprisoned on the ground that he is about to depart the jurisdiction intending to defraud his creditors,[46] and although the *Court Order Enforcement Act*[47] provides that "[n]o person shall be taken in execution on a judgment", the British Columbia Supreme Court Rules 1976[48] provide for arrest in a number of specific cases. For example, arrest may be ordered where, upon a judgment debtor examination, it appears that the debtor, "with intent to defraud the creditor, has made or caused to be made any gift or delivery or transfer of property, or has removed or concealed property".[49] The British Columbia Supreme Court Rules 1976 also authorize payment of a judgment debt by instalments or in a lump sum.[50] A debtor who fails to comply with such an order, and who fails to show "good cause why an order of committal should not be made against him", may be arrested and imprisoned for up to forty days.[51]

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[41] See *An Act respecting The Imperial Debtors' Act of 1869*, S.A. 1908, c. 6, and *An Act to Amend the Statute Law*, S.A. 1909, c. 4, s. 20.

[42] See *An Act respecting The Imperial Debtors Act of 1869*, S.S. 1918-19, c. 83.

[43] See Alberta Rules of Court, Alta. Reg. 390/68 as am., r. 354.

[44] It is not clear whether a debtor can be committed for non-payment of an ordinary money judgment in Saskatchewan. Rule 372 of the Saskatchewan Rules of the Court of Queen's Bench states that "[a] judgment requiring any person to do any act other than the payment of money . . . may be enforced by committal". However, in *Mihalyko v. Mihalyko* (1974), 13 R.F.L. 394 (Sask. Q.B.), concerned with the non-payment of a maintenance order, Bayda J. (at 396-97) seemed to suggest that the power to commit under r. 523 of the Saskatchewan Rules of the Court of Queen's Bench was "derived from and must be governed by s. 5 of the Debtors Act". Given that the Imperial *Debtors Act, 1869* was no longer in force in Saskatchewan at the time of this decision, the remarks of Bayda J. are somewhat difficult to understand.

[45] *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 1 and 49-54.

[46] Until 1975, a creditor could secure the arrest of his judgment debtor where there was probable cause for believing that the debtor was about to depart the jurisdiction with the requisite intent: see *Arrest and Imprisonment for Debt Act*, R.S.B.C. 1960, c. 17, s. 1. This Act was repealed, however, in 1975: see *Attorney-General Statutes Amendment Act*, S.B.C. 1975, c. 4, s. 1.

[47] *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 45. Section 5 of the precursor *Execution Act*, R.S.B.C. 1960, c. 135, provided that the only jurisdiction for the arrest of a defaulting judgment debtor was to be found in the *Arrest and Imprisonment for Debt Act*, *supra*, note 46.

[48] B.C. Reg. 310/76.

[49] *Ibid.*, r. 42(36)(*a*).

[50] *Ibid.*, r. 42(37).

[51] *Ibid.*, r. 42(38) and (39). The interrelationship of s. 45 of the *Court Order Enforcement Act*, *supra*, note 47, and r. 42(38) and (39) is dealt with by the British Columbia Court of Appeal in *Microwave Cablevision Ltd. v. Harvard House Capital Ltd.* (1982), 37 B.C.L.R. 101, 132 D.L.R. (3d) 570 (C.A.), rev'g (1981), 28 B.C.L.R. 393 (S.C.).

The other Canadian provinces have a variety of statutory provisions that are similar to, or broader than, the provisions of the British Columbia Supreme Court Rules 1976. For example, the Manitoba Queen's Bench Rules[52] contain a general prohibition against attachment of the person "by reason only of the non-payment of money".[53] However, Manitoba courts, like the British Columbia courts, are empowered to order a debtor to pay a judgment debt by instalments where the court is "satisfied that the judgment debtor is or will be in a position to pay the whole or any part of the judgment".[54] Non-compliance with such an order could result in the imprisonment of the judgment debtor for a period not exceeding twelve months.[55]

Under the New Brunswick *Arrest and Examinations Act*,[56] the court "may commit . . . any person who makes default in payment of any sum from him in pursuance of any order or judgment" where the court is satisfied that (1) the debtor has or has had, since the date of the order or judgment, the ability to pay (in whole or in part) and has refused or neglected to do so; (2) the debtor, with intent to defraud his creditors, has "made or caused to be made any gift, delivery or transfer of or charge on his property whereby the [creditor] is materially prejudiced in obtaining satisfaction";[57] (3) the debtor, with the requisite intent has removed or concealed his property, thereby materially prejudicing the creditors' efforts to obtain payment;[58] or (4) the judgment is based on conduct of the debtor that can be characterized as criminal.

The New Brunswick *Arrest and Examinations Act* also makes provision for a court to order payment of a judgment in instalments. A debtor in default of such an order, as is the case in British Columbia and Manitoba, is subject to bodily attachment.[59]

In Newfoundland, arrest and imprisonment of a judgment debtor is available as an enforcement remedy where the court finds:[60]

(a) that the judgment debtor has made or is about to make some disposition of some or all of his property;

(b) that the judgment debtor is about to quit the province, and that his absence will materially prejudice the recovery of the judgment; or

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[52] Man. Reg. 26/45.

[53] *Ibid.*, rr. 478 and 479.

[54] See *The Queen's Bench Act*, R.S.M. 1970, c. C280, s. 99, and the Manitoba Queen's Bench Rules, Man. Reg. 26/45, r. 523.

[55] *Ibid.*

[56] *Arrest and Examinations Act*, R.S.N.B. 1973, c. A-12, s. 40.

[57] A judgment debtor may also be committed for contempt in similar circumstances under r. 61.14(7)(d) of the New Brunswick Rules of Court, N.B. Reg. 81-174.

[58] A judgment debtor may also be committed for contempt in similar circumstances under r. 61.14(7)(d) of the New Brunswick Rules of Court, *ibid.*

[59] See *Arrest and Examinations Act*, *supra*, note 56, s. 45.

[60] See *The Judicature Act*, R.S.N. 1970, c. 187, s. 102. The power to secure the arrest of a defaulting debtor in such circumstances is an exception to the general rule under s. 100 of *The Judicature Act* that "[n]o person shall be arrested and held to bail in any civil action, on either original or final process . . .".

(c) that the judgment debtor is possessed of means of payment, of which he has control, and which he withholds from his creditors.

Similar to Ontario's *Fraudulent Debtors Arrest Act* is the Prince Edward Island *Bailable Proceedings Act*.[61] Under both Acts, the arrest and imprisonment of a judgment debtor who is about to quit the province with the intent to defraud his creditors may be ordered.[62] The *Bailable Proceedings Act*, however, also provides expressly for the arrest and imprisonment of a non-resident.[63] In Ontario, on the other hand, there is persuasive authority that a non-resident debtor cannot be arrested under the *Fraudulent Debtors Arrest Act*.[64]

Undoubtedly, the most comprehensive arrest and imprisonment powers are to be found in Nova Scotia. The statute governing postjudgment arrest of debtors in Nova Scotia is the *Collection Act*.[65] Section 3 of this Act prohibits arrest or imprisonment for default in payment of any judgment ordering or adjudging the payment of money otherwise than pursuant to the Act. The Act empowers a judgment creditor in Nova Scotia to conduct a judgment debtor examination to obtain information regarding the debtor's circumstances, his present or prospective means of paying the debt, and the disposition by the debtor of any of his property.[66] If the debtor fails to attend at the appointed time, a warrant for his arrest may issue.[67] Section 11(1)(c) of the *Collection Act* even permits a warrant to issue before an appointment for the examination of the debtor has been obtained where the creditor states under oath that "the debtor is about to leave the Province".

More importantly, the debtor may be committed to jail for a period not exceeding twelve months where it appears:[68]

(a) that the debt, which forms the subject of the judgment, was fraudulently contracted; or

(b) that the credit was obtained under false pretences; or

(c) that the debtor contracted the debt without having at the time any reasonable expectation of being able to pay the same; or

(d) that any other fraudulent circumstances have occurred in connection with the contracting of the debt; or

(e) that the debtor has made a fraudulent disposition of his property; or

(f) in cases of tort, that the tort was wilful and malicious.

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[61] R.S.P.E.I. 1974, c. B-1.

[62] *Ibid.*, s. 7. Section 8 of the Act provides that arrest for non-payment of a judgment debt otherwise than in accordance with the Act is abolished.

[63] *Ibid.*, s. 23.

[64] See *Red Star Laboratories Co. v. Pabst*, [1937] O.R. 864, [1937] 4 D.L.R. 236 (C.A.).

[65] *Collection Act*, R.S.N.S. 1967, c. 39. See, also, the *Indigent Debtors Act*, R.S.N.S. 1967, c. 136.

[66] *Collection Act*, *supra*, note 65, s. 4(1).

[67] *Ibid.*, s. 10.

[68] *Ibid.*, s. 27(2).

If it appears that the judgment debtor has sufficient income or means, section 29(1) authorizes the making of "an order requiring [the debtor] to pay the amount due on the judgment by instalments". Failure to comply with such an order may result in the debtor undergoing further examination, and "[w]here, upon such examination, it appears . . . that the debtor has without reasonable excuse refused or neglected to pay . . . and is possessed of means or income sufficient to pay",[69] the debtor may be arrested and imprisoned. As in the case of the legislation of most provinces, the Nova Scotia *Collection Act* provides a procedure by which the judgment debtor can apply for his release.[70]

In addition to the arrest powers contained in the *Collection Act*, reference should be made to certain provisions contained in the 1971 Nova Scotia Civil Procedure Rules concerned with the matter of arrest. Rule 55.01(1) states as follows:

> 55.01.-(1) The power of the court to punish for contempt of court may be exercised by a contempt order, which may be granted by the court, upon notice . . . .

Reference should also be made to paragraphs (1), (2), and (3) of Rule 52.01, which read as follows:[71]

> 52.01.-(1) An *order for the payment of money*, other than the payment of money into court, may be enforced by one or more of the following orders,
>
> (a) an execution order as provided in rule 53;
>
> (b) a receivership order as provided in rule 54;
>
> (c) a contempt order as provided in rule 55.
>
> (2) An *order for the payment of money into court* may be enforced by one or more of the following orders,
>
> (a) a receivership order under rule 54;
>
> (b) a contempt order under rule 55.
>
> (3) An *order for the recovery of money* may be enforced by one or more of the following orders,
>
> (a) an execution order as provided in rule 53;
>
> (b) a receivership order as provided in rule 54.

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[69] *Ibid.*, s. 30(4).

[70] *Ibid.*, ss. 30(5) and 31 *et seq.*

[71] Emphasis added.

The relationship between Rule 55 and the prohibition against arrest contained in section 3 of the *Collection Act* was considered in the recent case of *MacNeil v. MacNeil*.[72] This case concerned an application for a contempt order under Rule 55 by a maintenance creditor seeking to enforce a lump sum maintenance order. The evidence showed that, immediately after the maintenance order was made, the maintenance debtor removed certain securities to the United States from Nova Scotia. The maintenance debtor argued that he could not be imprisoned for contempt for failure to pay the lump sum maintenance order, since section 3 of the *Collection Act* abolished arrest and imprisonment of debtors for non-payment of a judgment debt except in accordance with the terms of this Act.

The judgment of the Nova Scotia Supreme Court, Appeal Division, was delivered by MacKeigan C.J.N.S. His Lordship was careful to point out that the contempt found by the judge at first instance "was not mere default in payment of an order for payment of money, but a defiance of the court by manipulating, concealing and removing assets from the jurisdiction so as to make execution impossible".[73] Chief Justice MacKeigan then added the following comments:[74]

> The act of removing the assets from the jurisdiction was an act 'obstructing, or tending to obstruct or interfere with the administration of justice' and not just 'disobedience to the judgments, order or other process of the court'. This is thus not just a private matter between Mr. and Mrs. MacNeil. It has become one which concerns the state, because an offence has been committed against the state itself in the administration of justice making a travesty of the court and its process. The offence is aggravated by the offender being a Queen's Counsel, a Crown prosecutor, and an officer of the court.

In support of this conclusion, the Chief Justice of Nova Scotia noted that, in spite of the fact that the Ontario *Fraudulent Debtors Arrest Act* provides that "no person shall be liable to arrest for contempt for non-payment of money payable by a judgment", Rule 594 of the Supreme Court of Ontario Rules of Practice authorizes committal where it appears from a judgment debtor examination that the debtor "has concealed or made away with his property in order to defeat or defraud his creditors".

MacKeigan C.J.N.S., it should be noted, also expressed the opinion that Rule 55 of the 1971 Nova Scotia Civil Procedure Rules overruled section 3 of the *Collection Act* "to the extent that any inconsistency or conflict exists".[75] Accordingly, even if it were necessary to hold that the arrest was ordered for non-payment of money, rather than "for criminal contempt in concealing and removing assets to avoid execution",[76] the arrest still would have been proper.

As the discussion above indicates, the availability of postjudgment

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[72] (1975), 25 R.F.L. 357 (N.S.S.C., App. Div.).

[73] *Ibid.*, at 365.

[74] *Ibid.*, at 367.

[75] *Ibid.*, at 369.

[76] *Ibid.*, at 368.

arrest and imprisonment as an enforcement remedy varies from province to province. Its use is most restricted in Alberta. While the remedy has been abolished in Quebec and Saskatchewan, it may be that a creditor in these two provinces may resort to contempt proceedings in appropriate circumstances. In Prince Edward Island, postjudgment arrest and imprisonment is available in circumstances similar to those outlined in the Ontario *Fraudulent Debtors Arrest Act*. In Manitoba, arrest and imprisonment is available to enforce a judgment where the judgment has been ordered to be paid in instalments; postjudgment arrest and imprisonment is available in British Columbia for this and other purposes. The remedy of postjudgment arrest and imprisonment is most widely available in New Brunswick, Newfoundland, and Nova Scotia.

5. POSTJUDGMENT ARREST AND IMPRISONMENT FOR NON-PAYMENT OF A SUPPORT OR MAINTENANCE ORDER: THE PRESENT ONTARIO POSITION

It has already been noted that the Supreme Court of Ontario and the county and district courts in the Province apparently have no inherent power to commit for contempt a debtor who does not pay a money judgment.[77] Nor is there legislative authority to imprison for non-payment of a money judgment in the case of these courts. The latter situation should be contrasted with the statutory arrest and imprisonment powers enjoyed by the Ontario provincial courts (family division) with respect to maintenance and support orders.

The arrest and imprisonment powers of the provincial court (family division) are now to be found in the *Family Law Reform Act*.[78] The most important of these powers is contained in section 29, which may be called into play in conjunction with "show cause proceedings" authorized by section 28 of the Act. Sections 28 and 29 of the *Family Law Reform Act* read as follows:

> 28.-(1) Where there is default in payment under an order for support or maintenance, a clerk of the Unified Family Court or a provincial court (family division) may require the debtor, upon notice,
>
> (*a*) to file a statement of financial information referred to in section 23;
>
> (*b*) to submit to an examination as to assets and means; and
>
> (*c*) to appear before the court to explain the default.
>
> (2) If the debtor fails to appear as required after being served with a notice, or if the court is satisfied that the debtor cannot be served or intends to leave Ontario without appearing as required after being served, the court giving the notice may issue a warrant for the arrest of the debtor for the purpose of compelling attendance.

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[77] See discussion *supra*, this ch., sec. 3.

[78] *Family Law Reform Act*, R.S.O. 1980, c. 152.

> 29.-(1) Where the debtor fails to satisfy the court that the default is owing to his or her inability to pay and where the court is satisfied that all other practicable means that are available under this Act for enforcing payment have been considered, the court may,
>
> (*a*) order imprisonment for a term of not more than ninety days to be served intermittently or as ordered by the court; or
>
> (*b*) make such other order as may be made upon summary conviction for an offence that is punishable by imprisonment.
>
> (2) The order for imprisonment under subsection (1) may be made conditional upon default in the performance of a condition set out in the order, including the performance of a community service order.

It should be noted that proceedings under these provisions may be initiated by the clerk of the court. Moreover, by virtue of section 27(1)(*c*) of the Act, enforcement proceedings may be initiated by the Ministry of Community and Social Services or a municipal corporation if the Ministry or the municipality is providing the maintenance or support creditor[79] with benefits under the *Family Benefits Act*[80] or assistance under the *General Welfare Assistance Act*.[81]

Reference also should be made to section 24 of the *Family Law Reform Act*, which provides as follows:

> 24. Where . . . a notice is issued under section 28 and a judge of the court is satisfied that the . . . debtor is about to leave Ontario, the judge may issue a warrant in the form prescribed by the rules of the court for the arrest of the . . . debtor.

It should be noted that the warrant for arrest prescribed by the Rules of the Provincial Court (Family Division)[82] commands the peace officer to whom it is directed "to bring [the debtor] before the court to be dealt with according to law or, if the court is not then sitting or [the debtor] is found in another county or district and cannot be brought before the court immediately . . . to take him/her to a provincial correctional institution or other secure facility and to detain him/her there until he/she can be brought before the court". The Act gives no indication of what may or ought to happen to a debtor arrested pursuant to section 24 when he or she is brought before the court.

There is little jurisprudence on the scope of the provisions of the *Family Law Reform Act* set out above. As sections 28 and 29 have taken the place of the "show cause" provisions of *The Deserted Wives' and Children's Maintenance Act*,[83] cases decided under that Act may be of assis-

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[79] The terms maintenance and support are used interchangeably throughout this chapter.

[80] R.S.O. 1980, c. 151.

[81] R.S.O. 1980, c. 188.

[82] Rules of the Provincial Court (Family Division), R.R.O. 1980, Reg. 810, Form 3.

[83] R.S.O. 1970, c. 128, s. 12.

tance in interpreting the new legislation. However, there is very little case law respecting section 12 of *The Deserted Wives' and Children's Maintenance Act*. We turn then to consider what little jurisprudence there is under both *The Deserted Wives' and Children's Maintenance Act* and the *Family Law Reform Act* concerning the availability of postjudgment arrest and imprisonment as an enforcement remedy in the circumstances under consideration.

One of the more noteworthy decisions to date with respect to sections 28 and 29 of the *Family Law Reform Act* is *Das v. Das*.[84] There the maintenance debtor had been served with a notice of default, pursuant to section 28(1), indicating that he was $510 in arrears in the payment of support. The maintenance debtor paid this sum into court, but additional arrears then began to build up. The maintenance debtor argued that, since the amount specified in the notice of default had been paid, he could not be required to appear in court to explain the subsequent default. In support of this contention, the debtor argued "that where imprisonment is a possible result . . . [he] must receive notice of the exact case that he has to meet as a matter of natural justice".[85] This was the position under section 12 of *The Deserted Wives' and Children's Maintenance Act*, the precursor to sections 28 and 29 of the *Family Law Reform Act*.

Weisman Prov.Ct.J. rejected the arguments of the maintenance debtor. His views on the jurisdiction granted by these sections of the *Family Law Reform Act* were as follows:[86]

> [D]ifficulties arose in enforcement proceedings under s. 12 of the *Deserted Wives' and Children's Maintenance Act*. Since the Court's jurisdiction was limited to the amount stated in the information arrears accruing after the date of the information could not be enforced at the hearing. The husband accordingly was able to remain continuously in arrears by delaying proceedings.
>
> Section 10 of the *Interpretation Act*, R.S.O. 1970, c. 225, provides, in part:
>
> > 10. Every Act shall be deemed to be remedial . . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.
>
> This leads me to conclude that in the absence of clear legislative intent to the contrary I am not to construe [s. 28(1) and s. 29] of The Reform Act in a manner which would perpetuate the abuses that existed under s. 12 of the *Deserted Wives' and Children's Maintenance Act*.
>
> In my opinion the words 'may enforce the order' in [s. 28(1)] of The Reform Act authorize the Court to enforce payment of any arrears that are

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[84] (1978), 21 O.R. (2d) 701, 93 D.L.R. (3d) 638 (Prov. Ct. (F.D.)) (subsequent references are to 21 O.R. (2d)).

[85] *Ibid.*, at 702.

[86] *Ibid.*

> proven to exist as of the date of the hearing. The Court is not limited to those arrears outstanding at the date the notice of default was issued.

In other words, the maintenance debtor need not be advised precisely as to the case he must meet insofar as show cause proceedings under the *Family Law Reform Act* are concerned.

Where imprisonment of the debtor is desired by the maintenance creditor, undoubtedly the most important issue will be the maintenance debtor's ability to pay. Under section 29(1) of the *Family Law Reform Act*, where a debtor is brought before a court to explain his default in payment of a maintenance order, the onus is on the debtor "to satisfy the court that the default is owing to his or her inability to pay". Again, the case law is very sparse on the meaning to be given to the term "inability to pay". Only a few reported cases defining this phrase have been decided under the *Family Law Reform Act*. However, there are a number of reported cases in which this issue was considered in connection with section 12 of *The Deserted Wives' and Children's Maintenance Act*. It may be useful at this juncture to set out section 12:

> 12.-(1) When default is made in the payment of a sum of money ordered to be paid under this Act, a justice of the peace,
>
> (*a*) may from time to time summon the person in default to explain the default; and
>
> (*b*) if the service of the summons is proved and the person summoned does not appear and sufficient reason for his absence is not given, or if it appears that the summons could not be served, may issue a warrant for his arrest,
>
> and, if upon the hearing before a judge the person in default fails to satisfy him that the default is due to inability to pay, he may order and adjudge the person to be imprisoned for a term of not more than three months unless the sum payable under the first-mentioned order, or such lesser sum as the judge designates, is sooner paid.

It should be noted that the only defence apparently available to a defaulting maintenance debtor under this provision was inability to pay, and it was so held in a number of decisions.[87] Consequently, the fact that the maintenance creditor denied the maintenance debtor access to their children was not a valid defence to a request for the imprisonment of the maintenance debtor by the maintenance creditor for default in payment of a maintenance order.[88] Similarly, the fact that the maintenance creditor had left the jurisdiction afforded no defence to the maintenance debtor.[89]

The most detailed discussion of the issue of inability to pay would

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[87] See, for example, *Hwong v. Hwong* (1976), 24 R.F.L. 70 (Ont. Prov. Ct. (F.D.)).

[88] See Komar, "The 'Show Cause' Enforcement of Maintenance Orders" (1978), 1 Can. J. Fam. L. 511, at 556-57.

[89] *Ibid.*, at 559.

appear to be contained in the judgment of Main Prov. Ct. J. in *Gallivan v. Gallivan*,[90] where it was stated as follows:[91]

> There may be many reasons for a respondent's failure to meet the financial obligation imposed by a maintenance order. Too often the excuses given range from outright defiance to a misguided sense of priorities. In regard to the latter, the court is frequently urged to accept and endorse a diversion of available funds to the satisfaction of voluntary expenditures rather than to the duty of compliance with the maintenance order of a court of competent jurisdiction, which order ordinarily ranks ahead of such expenditures in time and always in importance. Such a proposal is unacceptable and does not reflect the meaning of the words 'inability to pay'. Subject to a consideration of all the relevant circumstances in any particular case, the words, 'inability to pay' mean a deficit of resources with which to meet the outstanding legal obligation and *which deficit has resulted from circumstances beyond the control of the payor. Should the court determine that the failure to pay was due to other than such involuntary circumstances then the respondent is without lawful excuse and is subject to the exercise of a judicial discretion as to the terms of any enforcement order*. In this regard, the current availability of resources as well as the effect of the order upon present dependents are factors which must be taken into account. The order for and use of incarceration to evoke payment and thus provide the resources to meet the needs of the recipients of the maintenance order is a legitimate consideration in appropriate circumstances.

If the maintenance debtor is capable of securing employment, but chooses not to do so, then arguably he has the ability to pay.[92] This view is in accordance with a great many American authorities,[93] although support also can be found for the contrary view.[94]

Those cases decided under the *Family Law Reform Act* make clear at least one point. The onus of establishing "inability to pay" under section 29(1) rests with the defaulting maintenance or support debtor, whereas the onus of showing that "all other practicable means . . . for enforcing payment have been considered" rests with the applicant.[95]

One final point about the enforcement of maintenance orders by way of the arrest and imprisonment of the maintenance debtor should be made here. Earlier, we made reference to the recent decision of the Ontario Court of Appeal in *Cohen v. Cohen*.[96] The Court in that case concluded

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[90] (1977), 26 Chitty's L.J. 67 (Ont. Prov. Ct. (F.D.)).

[91] *Ibid.*, at 70 (emphasis added).

[92] See, for example, *Harris v. Watson* (1981), 34 O.R. (2d) 495 (Prov. Ct. (F.D.)); *Re Gehl and Greaves* (1981), 127 D.L.R. (3d) 653, 25 R.F.L. (2d) 193 (Ont. Co. Ct.) (husband lost job as a result of drinking problem), citing *Rajan v. Rajan*, unreported (June 22, 1981, Ont. Prov. Ct. (F.D.)) (self-induced impairment resulting in inability to continue employment due to incarceration is not justifiable or acceptable inability to pay); and *Re Warman*, unreported (April 8, 1981, Ont. Prov. Ct. (F.D.)).

[93] See Komar, *supra*, note 88, at 542.

[94] *Ibid.*

[95] See *Coomber v. Coomber* (1981), 21 R.F.L. (2d) 382 (Ont. Co. Ct.); *Mol v. Mol* (1980), 18 R.F.L. (2d) 253 (Ont. Co. Ct.); and *Re Cserzy v. Cserzy* (1981), 33 O.R. (2d) 653, 23 R.F.L. (2d) 217 (Co. Ct.). See, also, the recent case of *Brindley v. Brindley*, unreported (May 18, 1982, Ont. Co. Ct.).

[96] *Supra*, note 25.

that the Supreme Court of Ontario has no power "to commit to gaol for contempt of court for non-payment of a sum of money arising under a judgment, whether that judgment is for payment of maintenance or otherwise".[97] Nevertheless, arrest and imprisonment for non-payment of a maintenance or support order from the Supreme Court, or a county or district court for that matter, is still an option that is available to such maintenance creditors. A maintenance creditor in such a case may request that his or her order for support or maintenance be enforced by a provincial court (family division) and, as a result, have the benefit of the show cause procedure prescribed by the *Family Law Reform Act*.[98] The right to have a Supreme Court or county or district court judgment enforced in this manner is similar to the right that previously existed under *The Provincial Courts Act*,[99] which gave a maintenance creditor access to the "show cause" procedure under *The Deserted Wives' and Children's Maintenance Act*.

6. POSTJUDGMENT ARREST AND IMPRISONMENT FOR NON-PAYMENT OF A SUPPORT OR MAINTENANCE ORDER: THE OTHER PROVINCES

In this section, it is proposed to outline briefly the law of arrest and imprisonment for non-payment of a support or maintenance order in the other Canadian provinces.

In two provinces – New Brunswick[100] and Prince Edward Island[101] – recently enacted family law legislation contains a scheme for postjudgment arrest and imprisonment of maintenance or support creditors very similar to the "show cause procedure" found in sections 28 and 29 of the Ontario *Family Law Reform Act*. With respect to the enforcement of maintenance orders in the superior courts in New Brunswick, it will be recalled that the *Arrest and Examinations Act*[102] contains a broad provision permitting the imprisonment of debtors on the ground, *inter alia*, of "ability to pay".

In Alberta, although an ordinary creditor can no longer resort to postjudgment arrest and imprisonment to enforce a judgment,[103] a maintenance creditor may do so under the *Alimony Orders Enforcement Act*[104] and the *Domestic Relations Act*.[105] The former is concerned with the powers of the Alberta Court of Queen's Bench, the latter with provincial family courts. Under the *Alimony Orders Enforcement Act*, a maintenance debtor may be imprisoned for as long as one year where he has dealt with

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[97] *Ibid.*, at 171.

[98] *Family Law Reform Act*, *supra*, note 78, s. 29(1).

[99] R.S.O. 1970, c. 369, s. 25, rep. by S.O. 1978, c. 2, s. 86.

[100] See *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-21, ss. 123 and 126, as am. by S.N.B. 1981, c. 10.

[101] *Family Law Reform Act*, S.P.E.I. 1978, c. 6, ss. 28, 29, and 37.

[102] *Supra*, note 56, discussed *supra*, this ch., sec. 4.

[103] See discussion *supra*, this ch., sec. 4.

[104] R.S.A. 1980, c. A-40, s. 8.

[105] R.S.A. 1980, c. D-37, s. 28. Imprisonment is based on a default by the debtor and the fact that the debtor fails to satisfy the court of his inability to pay.

his property with intent to avoid compliance with a maintenance order or where he has had the ability to pay but has refused or neglected to do so.[106]

Somewhat similar legislation may be found in Newfoundland. Under section 14 of *The Maintenance Act*,[107] a maintenance debtor may be ordered arrested where the court is satisfied that the debtor "has made or is about to make some disposition of his or her property or part thereof or is about to leave his or her place of residence for another locality or province". The debtor, under this provision, may be held "until the disposition of the case".

In British Columbia,[108] Manitoba,[109] Newfoundland,[110] Nova Scotia,[111] and Saskatchewan,[112] a maintenance debtor is subject to some form of "show cause" proceedings. While the Newfoundland, Nova Scotia, and Saskatchewan legislation allows a defaulting maintenance debtor to escape arrest and imprisonment where he is able to show that he is unable to comply with the order, there is no express "inability to pay" defence found in the British Columbia and Manitoba legislation.

In a number of provinces, a maintenance debtor may be arrested and imprisoned for non-payment pursuant to the court's contempt power. This would appear to be the case, for example, in Quebec,[113] Nova Scotia,[114] and Saskatchewan.[115]

7. POSTJUDGMENT ARREST AND IMPRISONMENT: REFORM PROPOSALS IN OTHER JURISDICTIONS

(a) Money Judgments Other Than Orders for Support or Maintenance

In this section, we shall examine the proposals for reform of postjudgment arrest and imprisonment of a defaulting debtor put forth by the English Committee on the Enforcement of Judgment Debts (the "Payne

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[106] *Supra*, note 104, s. 8(1)(c)(i) and (ii).

[107] R.S.N. 1970, c. 223, as amended. See, also, s. 13 of *The Maintenance Act* authorizing imprisonment where there is a default and the debtor fails to satisfy the court that the default is due to inability to pay.

[108] *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 67. See *Butler v. Butler* (1981), 27 B.C.L.R. 268 (C.A.); *Prins v. Blomly*, [1982] 3 W.W.R. 753 (B.C.S.C.); *La v. La* (1982), 27 R.F.L. (2d) 36 (B.C.C.A.); and *Vance v. Vance* (1982), 28 R.F.L. (2d) 420 (B.C.S.C.).

[109] *The Family Maintenance Act*, S.M. 1978, c. 25, s. 26, as am. by S.M. 1979, c. 38, s. 1, and S.M. 1982, c. 13, s. 3.

[110] *The Maintenance Act*, *supra*, note 107, s. 13.

[111] *Family Maintenance Act*, S.N.S. 1980, c. 6, s. 39.

[112] *The Deserted Wives' and Children's Maintenance Act*, R.S.S. 1978, c. D-26, s. 14.

[113] See *Code of Civil Procedure*, *supra*, note 45, art. 1.

[114] See Nova Scotia Civil Procedure Rules, r. 55, and discussion *supra*, this ch., sec. 4.

[115] See Saskatchewan Rules of the Court of Queen's Bench 1967, rr. 523, 624, and 646. See, for example, *Mihalyko v. Mihalyko*, *supra*, note 44; *Lafonde v. Lafonde* (1981), 23 R.F.L. (2d) 135 (Sask. Q.B.); and *Parker v. Parker* (1982), 29 R.F.L. (2d) 451 (Sask. Q.B.).

Committee"),[116] the *Third Report of the Consumer Protection Project* prepared by the Law Reform Division of the New Brunswick Department of Justice,[117] the Report on *Debt Recovery in Australia* prepared by the Australian Government Commission of Inquiry into Poverty,[118] and a Study Paper on the Nova Scotia *Collection Act* prepared for the Nova Scotia Law Reform Advisory Commission.[119] We begin with an outline of the views and recommendations of the Payne Committee.

In its 1969 Report, the Payne Committee recommended the abolition of imprisonment for non-payment of civil debts other than support or maintenance debts, and the repeal of section 5 of *The Debtors Act, 1869*.[120] The Committee's conclusions may be summarized as follows:

— the hardship caused by imprisonment is out of all proportion to the debt sought to be collected;[121]

— imprisonment makes it more difficult for the debtor to meet his present and future debts;[122]

— the benefits realized from imprisonment do not justify its cost;[123]

— imprisonment, while an effective inducement to payment, is rendered redundant by a more effective enforcement regime;[124]

— the judgment summons procedure under section 5 of *The Debtors Act, 1869* is not consistent with fairness principles;[125]

— the judgment summons procedure is costly and time-consuming;[126]

— the types of debtor who go to prison are "inadequate men who are incapable of managing their own affairs; they are men who have

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[116] *Report of the Committee on the Enforcement of Judgment Debts* (Cmnd. 3909, 1969) (hereinafter referred to as the "Payne Committee Report").

[117] New Brunswick Department of Justice, Law Reform Division, *Third Report of the Consumer Protection Project*, Vol. II, *Legal Remedies of the Unsecured Creditor After Judgment* (1976) (hereinafter referred to as the "New Brunswick Report").

[118] Australian Government Commission of Inquiry into Poverty, *Debt Recovery in Australia* (1977) (hereinafter referred to as the "Australian Report").

[119] Nova Scotia Law Reform Advisory Commission, *The Collection Act: A Study Paper* (1974) (hereinafter referred to as the "Nova Scotia Report").

[120] Compare the approach adopted by the *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland* (1965), at 55, where no change was proposed in connection with the *Debtors Act (Ireland), 1872*.

[121] Payne Committee Report, *supra*, note 116, para. 958, at 247.

[122] *Ibid.*

[123] *Ibid.*, paras. 959-67, at 247.

[124] *Ibid.*, para. 965, at 248.

[125] *Ibid.*, para. 961, at 247.

[126] *Ibid.*, para. 962, at 247.

become overwhelmed by a burden of debt through illness, unemployment or other misfortune; they are irresponsible or feckless people who need control or temporary help, or many other types for whom imprisonment. . .was certainly not intended";[127] and

— whereas the able but unwilling debtor usually avoids imprisonment by last-minute payment of an outstanding judgment debt, the feckless or inadequate debtor frequently does not respond to a judgment summons and, as a result, is imprisoned by default.[128]

The Committee recognized the utility of a threat of imprisonment for the recalcitrant debtor:[129]

> 996. It would be idle not to recognise that in the past committal orders and the threat of imprisonment have compelled or induced many thousands of debtors to pay their debts in full or in part or to bring their instalments up to date, and this threat is still a potent factor in the field of debt recovery and enforcement. It does not, however, follow that, because committal has been in so many cases in the past the only effective process for the enforcement of debt, the sanction is therefore essential or desirable.

In reference to what it called the "hard core", the Payne Committee commented further as follows:[130]

> 1002. We ought perhaps, at the risk of repetition, to refer once more to the important topic of the hard core. We have been often asked what we propose to do with the hard core of persistent debtors if imprisonment is abolished, and we do not shrink from this important question. Members of the Committee are not sympathetic towards debtors of this class and they realise that there are many debtors who incur debts dishonestly and live on the fringe of fraud. Nonetheless they remain convinced that committal under the Debtors Act 1869 should be abolished. Under the system which has obtained for a hundred years or more the threat of imprisonment has no doubt been a potent factor in enforcing the recovery of debts from recalcitrant debtors, and it may be that for a time our new sanctions may seem less onerous, but we cannot reconcile ourselves to the view that it is justifiable to send inadequate or feckless persons to prison, or to threaten them with imprisonment, in order to extract money from thousands of others who have the means to pay. It must be remembered that it is not the persistent and dishonest debtor with means who goes to prison. He pays when the bailiff comes to arrest him.
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> 1003. There are two further answers to those who are troubled about the future of the hard core. The first is that the new enforcement procedure will provide a more effective method of extracting money from any debtors who have earnings, assets or property than have been available in the past. Secondly, potential creditors must, in the public interest, be encouraged or induced to protect themselves more vigilantly than they have hitherto. The Committee do not accept that any benefit to the business or trading community or to the

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[127] *Ibid.*, para. 980, at 251.

[128] *Ibid.*, para. 1001, at 257-58.

[129] *Ibid.*, para. 996, at 256.

[130] *Ibid.*, paras. 1002-04, at 258-59.

public at large can flow from the creation of bad debts, and, if would-be suppliers of goods can be persuaded to make proper inquiries before entering into transactions so as to ascertain whether their customers are, in fact, creditworthy before goods are supplied, this would be of the greatest benefit to all concerned and to the national interest.

The solution

1004. The new enforcement system is designed to discover and distinguish the inadequate from the recalcitrant, and, if committal were retained, we should hope to save the inadequates from prison, but the system is also designed to provide the means of obtaining money from debtors who have assets or income without the necessity of sending them to prison, and this, after all, is what the creditors desire. We are not abolishing committal because we are tender towards the persistent debtors but because we believe that more effective methods of obtaining payment can be introduced. If there are any who are inclined to use a fashionable phrase and describe the new enforcement system as a 'debtors' charter', we believe that time will show how erroneous is that judgment.

The issue of postjudgment arrest and imprisonment was also addressed in the *Third Report of the Consumer Protection Project*, Volume II, entitled *Legal Remedies of the Unsecured Creditor After Judgment*, prepared by the Law Reform Division of the New Brunswick Department of Justice. After a review of the postjudgment arrest provisions of the New Brunswick *Arrest and Examinations Act*, the Report stated as follows:[131]

> Little useful purpose seems to be served by the retention of provision for arrest of the debtor as a means of enforcing a judgment in an ordinary civil action. If resort to arrest is necessary as a punishment for disobedience of a direct court order, it can be dealt with under the power of the court to punish contempt. Direct orders to a debtor to pay, which may occur in the case of claims against fiduciaries such as lawyers and trustees, and instalment orders under the *Arrest and Examinations Act* could be enforced by contempt procedures in the same way that a specific remedy like an injunction or order for specific performance is enforced.
>
> The cost of imprisonment to the individual arrested and to society invariably outweighs the benefit to the claimant. The availability of this procedure should be limited to cases in which there is also an affront to society, such as a contempt of court. All other remnants of arrest in a civil action that were preserved at the time of the general abolition of arrest for debt to New Brunswick in 1874 should be eliminated.

The New Brunswick Report made the following recommendation:[132]

> It is recommended that all remaining provisions for arrest of a person in a civil action, before or after judgment, other than provisions for punishment of disobedience of a direct court order under powers respecting contempt of court, be eliminated.

Insofar as the court's contempt powers were concerned, the Law Reform

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[131] New Brunswick Report, *supra*, note 117, at 77.

[132] *Ibid.*, at 78 (emphasis deleted).

Division of the New Brunswick Department of Justice wished to see them extended to enable "a court to make an order to pay, enforceable by proceedings for contempt, in any case in which the judgment debtor has incurred a liability in the province which he does not pay within what the court considers a reasonable time if the debtor has not sufficient assets within the jurisdiction to satisfy the liability and if the court is satisfied that it is necessary and just for such an order to be made".[133]

If implemented, the proposals contained in the *Third Report of the Consumer Protection Project*, discussed above, would have the following effect. The grounds for postjudgment arrest and imprisonment set out in the New Brunswick *Arrest and Examinations Act*[134] would be replaced by a general contempt power. It is unclear from the New Brunswick Report whether the contempt power would comprehend some or all of the grounds for imprisonment found in the *Arrest and Examinations Act* or would be available only in the case of a direct order to pay.

Reference should also be made to the discussion of postjudgment arrest and imprisonment as a method of enforcement in the 1977 Report on *Debt Recovery in Australia*, prepared by the Australian Government Commission of Inquiry into Poverty. The Report made no recommendations concerning the abolition or retention of the remedy of postjudgment arrest and imprisonment. Rather, it examined the use of arrest and imprisonment to combat two perceived abuses: (1) non-attendance on an examination summons, and (2) refusing or neglecting to pay a debt, notwithstanding the availability of funds to do so. Its main concern with the use of imprisonment to deal with these abuses was the "lack of due process":[135]

> On the one hand, the type of hearing which is held is such as to raise the most serious questions concerning the protection afforded the debtor. Representation is extremely rare, the strict rules of evidence are inapplicable, the burden of proof is less than that required for criminal conviction and the range of penalties available to the tribunal is narrower than on a criminal charge.

While referring to the existence of a special procedure available to a debtor imprisoned for non-attendance on an examination, the Report of the Australian Government Commission of Inquiry into Poverty noted that "many, if not most, debtors made subject to such an order remain in complete ignorance of the special procedure".[136] It added that "[n]o concerted effort is made to ensure that the debtor is aware of his rights".[137] In addition, the Report was critical of the ability of a defaulting debtor to purge his contempt "by paying the sum still outstanding", since this had

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[133] *Ibid.*, at 80 (emphasis deleted). It should be noted, however, that the Report did include a recommendation to the effect that "further study be given to the contempt power as the ultimate weapon of the courts in both public and private legal process": *ibid.*, at 81 (emphasis deleted).

[134] *Supra*, note 56, discussed *supra*, this ch., sec. 4.

[135] Australian Report, *supra*, note 118, at 7-8.

[136] *Ibid.*, at 8.

[137] *Ibid.*

"the effect of discriminating, on the basis of the possession of, or access to, funds adequate for the purpose, between persons whose fault in non-attendance on a summons is identical".[138]

The Study Paper on the *Collection Act* prepared for the Nova Scotia Law Reform Advisory Commission described the impact on resort to imprisonment of a 1969 amendment to the Act.[139] That amendment removed the issuance of warrants for arrest from the jurisdiction of examiners and special examiners and empowered only county court judges to issue such warrants. In the view of the author of the Study Paper, this amendment rendered "the Act more or less ineffectual",[140] because of the "additional trouble and expense of making a separate application to a county court judge".[141] The author of the Study Paper suggested that resort to arrest and imprisonment also had declined because of "the new form of execution order available under the *Civil Procedure Rules* . . . a more effective means of collecting debts – it is cheaper and more direct; one document can be used to levy against goods and, in particular, to garnishee wages".[142] In addition, it was pointed out that "[t]he attachment order under the *Civil Procedure Rules* and the capias procedure of the minor civil courts have always provided a more effective means of dealing with absconding debtors".[143] For these and other reasons, it was recommended that the *Collection Act* be repealed.[144] It was further proposed, however, that certain features of the *Collection Act* be transferred to the small claims court; for example, a procedure for the examination of the debtor, and a provision for the making of instalment orders.[145] Finally, it was recommended that the small claims court be authorized to issue attachment (for the seizure of goods) in circumstances identical to those outlined in Rule 49.04A of the Nova Scotia Civil Procedure Rules.[146] Presumably, these additional powers would reduce the risks for unsecured creditors, since their debtors would be less likely to frustrate enforcement efforts by disposing, removing, or concealing exigible property before judgment.

(b) Money Judgments for Support or Maintenance

Significantly, there has been nearly unanimous support for the retention of postjudgment arrest and imprisonment as a final means of enforcing a maintenance or support order. Earlier in this chapter, the postjudgment arrest provisions that exist in the common law provinces were described. Recently enacted legislation in New Brunswick, Nova Scotia, and Prince Edward Island has confirmed the power of the court to

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[138] *Ibid.*, at 9.

[139] *An Act to Amend Chapter 39 of the Revised Statutes, 1967, the Collection Act*, S.N.S. 1969, c. 30.

[140] Nova Scotia Report, *supra*, note 119, at i.

[141] *Ibid.*, at 119.

[142] *Ibid.*

[143] *Ibid.*

[144] *Ibid.*, at 126.

[145] *Ibid.*, at 126-29.

[146] *Ibid.*, at 129-30.

imprison a defaulting maintenance debtor in a variety of circumstances.[147] In addition, virtually all law reform bodies that have examined the need for such a power have been in favour of resort to arrest and imprisonment as the ultimate weapon in the maintenance or support creditor's arsenal.

The most comprehensive examination of this issue is to be found in the *Report of the Committee on the Enforcement of Judgment Debts*.[148] It will be recalled that the Payne Committee advocated the abolition of postjudgment arrest as a means of enforcing money judgments other than those for maintenance or support. The Committee, however, was badly divided on the issue of abolition in the context of support or maintenance orders.

Three Committee members favoured the retention of the postjudgment arrest remedy available to support or maintenance creditors for the following reasons:

— maintenance or support debtors should not be allowed to flout a court order with impunity;[149]

— maintenance debts and ordinary civil debts are distinguishable, the former being continuing in nature;[150]

— the maintenance creditor is an involuntary creditor without ability to terminate his or her spouse's "credit";[151]

— improved methods of distinguishing between "adequate" and "inadequate" debtors would help to ensure that only those who wilfully refuse to pay their maintenance obligations would be imprisoned;[152] and

— maintenance orders, unlike ordinary civil judgments, are subject to variation in accordance with the means available to maintenance debtors.[153]

Six members of the Payne Committee proposed the abolition of imprisonment as a method of enforcing a maintenance or support order for many of the same reasons that convinced the Committee that imprisonment for ordinary civil debt should be abolished. First, they rejected the position that imprisonment for debt serves as a general deterrent.[154] Secondly, they were of the view that "many maintenance defaulters are

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[147] See discussion *supra*, this ch., sec. 6.

[148] Payne Committee Report, *supra*, note 116.

[149] *Ibid.*, para. 1037, at 267-68.

[150] *Ibid.*, para. 1042, at 268.

[151] *Ibid.*, para. 1043, at 268-69.

[152] *Ibid.*, para. 1045, at 269.

[153] *Ibid.*, para. 1053, at 271.

[154] *Ibid.*, para. 1091, at 280.

just as inadequate and socially incompetent as civil debtors".[155] Thirdly, they were concerned that there were insufficient safeguards against an unfair deprivation of liberty.[156] Fourthly, it was their opinion that the improvements recommended by the Committee for the enforcement of judgment debts rendered postjudgment arrest unnecessary. In this respect, they stated:[157]

> [W]e think the position of defaulters is straightforward: either they have the means to pay or they have not. If they have the means, the maintenance order will not be flouted because the machinery of extraction will be exercised to the full. If they lack the means to pay, they are not wilfully or culpably refusing to pay. From the community's point of interest, imprisoning maintenance defaulters is futile.

These Committee members denied that there was any meaningful distinction between maintenance creditors and ordinary judgment creditors.[158] They pointed out that the Committee had recommended the abolition of imprisonment in the case of another category of involuntary creditors – that is, where the debts were rates and taxes.[159] In conclusion, it was their view that imprisonment "is expensive, it is likely to reduce the already poor earning power of the defaulter, it provides neither financial assistance nor safeguards for wives or children and it damages marriage by destroying finally any hope of reconciling the estranged spouses or encouraging continuing relationships between fathers and their children".[160]

Two members of the Committee were of the view that arrest for nonpayment of a maintenance order should be retained solely on the grounds that maintenance creditors are involuntary creditors and that the "new system of enforcement would be more effective if imprisonment was retained".[161] They thought that, "until either the State makes better provision for the deserted wife and child, or the new system for enforcement of civil debts has been in operation for some years and has been found to work efficiently",[162] abolition of postjudgment arrest would be premature.

Finally, a single Committee member did not see any urgency regarding the abolition of postjudgment arrest in the case of maintenance defaulters:[163]

> Defaulting deserting husbands have not a good public image. They must not be surprised if some of us do not include them in the same Charter as civil debtors, whom I have included in my first priority. We would all like a perfect world now, but experience teaches us that some things must come gradually.

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[155] *Ibid.*, para. 1092, at 281.

[156] *Ibid.*, paras. 1093-95, at 281-84.

[157] *Ibid.*, para. 1096, at 284.

[158] *Ibid.*, para. 1097, at 285.

[159] *Ibid.*

[160] *Ibid.*

[161] *Ibid.*, paras. 1101-04, at 287-88.

[162] *Ibid.*, para. 1104, at 288.

[163] *Ibid.*, para. 1108, at 289.

> In my view this is such an example. This problem in any case impinges on family law and is not exclusively within our terms of reference.

In 1978, the Alberta Institute of Law Research and Reform published *Report No. 27: Matrimonial Support*.[164] Among the matters examined by the Institute in this Report was the power of a court to imprison a defaulting maintenance debtor under section 8 of *The Alimony Orders Enforcement Act*,[165] as well as under section 28 of *The Domestic Relations Act*.[166] The Institute noted the following arguments in favour of abolishing imprisonment for non-payment of a maintenance debt:[167]

> Imprisonment for debt is repugnant to present notions of justice. The present law which we have described provides for imprisonment for refusal to pay when able to do so and not for the debt itself; but it is a feature of the system which makes the system appear punitive and its processes like those of the criminal law. Imprisonment, whether for debt or for refusal to pay, is not available to any other creditor with a money judgment. Whatever the situation might have been in earlier times, the availability of social assistance means that the dependent spouse and family will not be utterly destitute if support payments are not made, so that there is now less reason to apply such a harsh sanction. Judges are reluctant to commit, and the threat is therefore often seen as an empty one. Attachment of earnings is more likely to be a more efficient remedy if the principal financial resource of the respondent is his earnings, and execution and garnishment are available in the case of one who has property and business resources. Finally, if a respondent spouse is in jail he has no way of earning money to pay the arrears.

Nonetheless, retention of imprisonment as an enforcement tool was advocated. It was noted that "quite often money is forthcoming in order to avoid imprisonment and that the respondent is thereafter likely to be careful not to provoke the exercise of that power again".[168] In addition, the Report commented on the inappropriateness of existing legal machinery for the collection of small periodic sums, such as maintenance. Even improvement in the enforcement system, the Institute stated, would not obviate the need or usefulness of imprisonment, or the threat of imprisonment, as a method of enforcement.[169]

However, the Institute did stress the importance of restricting the availability of this remedy "to the case of a respondent spouse who could pay and has not done so".[170] Moreover, the Report noted the need to provide the defaulting maintenance debtor with an "adequate opportunity to have the propriety of the award reviewed".[171]

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[164] Alberta Institute of Law Research and Reform, *Report No. 27: Matrimonial Support* (1978) (hereinafter referred to as the "Alberta Report").

[165] R.S.A. 1970, c. 17. See now the *Alimony Orders Enforcement Act*, R.S.A. 1980, c. A-40.

[166] R.S.A. 1970, c. 113, as amended. See now the *Domestic Relations Act*, R.S.A. 1980, c. D-37.

[167] Alberta Report, *supra*, note 164, at 146.

[168] *Ibid.*, at 146-47.

[169] *Ibid.*, at 147.

[170] *Ibid.*

[171] *Ibid.*

Imprisonment for non-payment of maintenance orders also was examined in the recently published *Tentative Proposals for an Enforcement of Maintenance Orders Act*, put forward by the Law Reform Commission of Saskatchewan.[172] While recognizing the utility of "routine use of imprisonment to enforce compliance with maintenance orders",[173] the Saskatchewan Commission was of the opinion that the objections to the practice outweighed its advantages. Accordingly, the Commission recommended that the power to commit for contempt of court be retained in modified form, and that the following provision be included in the proposed *Enforcement of Maintenance Orders Act*:[174]

> (1) Except as otherwise provided in this Act, no person shall be imprisoned as a result of failure to pay maintenance.
>
> (2) The court may, following a show cause examination, direct that a maintenance debtor be imprisoned for contempt if, in the opinion of the court, the maintenance debtor has the ability to pay maintenance but has
>
> (i) wilfully evaded payment of maintenance by concealing or attempting to conceal assets, or by placing, or attempting to place, assets beyond the reach of the maintenance creditor; or
>
> (ii) repeatedly failed to make payments of maintenance when directed to do so following show cause examinations.
>
> (3) A person imprisoned under this section may be imprisoned until the contempt is purged, or thirty days, whichever is the lesser.

Insofar as "show cause" proceedings under *The Deserted Wives' and Children's Maintenance Act*[175] were concerned, the Law Reform Commission of Saskatchewan did not recommend any change to the power of a court to imprison a debtor for failure to show cause.[176]

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[172] Law Reform Commission of Saskatchewan, *Tentative Proposals for an Enforcement of Maintenance Orders Act* (1982) (hereinafter referred to as the "Saskatchewan Report").

[173] *Ibid.*, at 53.

[174] *Ibid.*, at 53-54.

[175] R.S.S. 1978, c. D-26, s. 14.

[176] The Commission, however, did recognize the need to provide expressly for the powers that a court should have in show cause proceedings. For example, it was recommended that the proposed *Enforcement of Maintenance Orders Act* provide that "the *court* may examine the debtor concerning his assets, income and other financial affairs, and the reason for his default": Saskatchewan Report, *supra*, note 172, at 57 (emphasis added). In this way, Saskatchewan show cause proceedings would be similar to the default proceedings available under the Ontario *Family Law Reform Act* (see discussion *supra*, this ch., sec. 5), with express authorization for the court to conduct the examination of the defaulting maintenance debtor. In addition, it was recommended that the show cause procedure should be available to a maintenance creditor proceeding in any Saskatchewan court: Saskatchewan Report, *supra*, note 172, at 57.

8. CONSTITUTIONALITY OF POSTJUDGMENT ARREST AND IMPRISONMENT AS AN ENFORCEMENT REMEDY

There are now two potential grounds for challenging legislation giving courts the power to imprison a debtor for non-payment of a judgment debt. The first concerns sections 91 and 92 of *The British North America Act, 1867* – now the *Constitution Act, 1867*[177] – which deals with the division of powers between the federal and provincial legislatures. The second possible basis for challenging the validity of postjudgment arrest provisions is the recently proclaimed *Canadian Charter of Rights and Freedoms*.[178]

The division of powers argument revolves around section 91.27 and paragraphs 13, 14, and 15 of section 92. Section 91.27 gives the Parliament of Canada exclusive legislative authority over "[t]he criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters". Paragraphs 13, 14, and 15 of section 92 give provincial legislatures the exclusive right to make laws in respect of the following matters:

> 13. Property and civil rights in the Province.
>
> 14. The administration of justice in the Province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.
>
> 15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

The constitutionality of provincial legislation authorizing postjudgment arrest of debtors was first raised in the case of *Ex parte Ellis*.[179] At issue was New Brunswick legislation similar to sections 5 and 13 of the Imperial *Debtors Act, 1869*.[180] Section 5, as we have seen, empowers a court to imprison a debtor who "has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same". Section 13(1) of *The Debtors Act, 1869* made it an offence, punishable by imprisonment, "if in incurring any debt or liability" any one "has obtained credit under false pretences, or by means of any other fraud".[181]

Allen C.J., speaking for the majority of the Court, was of the opinion that the legislation under review was not in relation to matters of criminal law:[182]

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[177] See the schedule to the *Constitution Act, 1982*, which itself is scheduled to the *Canada Act 1982*, c. 11 (U.K.), proclaimed in force on April 17, 1982.

[178] Being Part I of the *Constitution Act, 1982*, *supra*, note 177.

[179] *Ex parte Ellis* (1878), 17 N.B.R. 593 (S.C.).

[180] *Supra*, note 17.

[181] This section was repealed by the *Theft Act 1968*, c. 60, ss. 33(3) and 35, Sch. 3, Part I.

[182] *Supra*, note 179, at 597.

> The whole object of that part of the Act is to enforce the payment of the judgment, just as was formerly the object of issuing a *Ca. Sa.* execution against a judgment debtor. There is nothing in the Act making the refusal to pay the amount of the judgment an offence or subjecting the debtor to a penalty for refusing . . . .

Insofar as the provision equivalent to section 13(1) of the Imperial *Debtors Act, 1869* was concerned, Allen C.J. commented as follows:[183]

> By the 92d section of 'The British North America Act,' the Provincial Legislature has the exclusive right to make laws (*inter alia*) in relation to (13) 'Property and civil rights in the Province.' (14) 'The administration of justice in this Province including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts.' (15) '*The imposition of punishment* by fine, penalty or *imprisonment*, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.'
>
> Now, surely, the enforcing the payment of a judgment is a civil right, and the mode of enforcing it [is] a part of the administration of justice, and procedure in civil matters in the Province, all of which are expressly within the jurisdiction of the Provincial Legislature. Having therefore the right to legislate on these subjects, the 15th sub-section gives them power to enforce any such laws by imposing *imprisonment*. It would seem, therefore, that the power conferred by this section of c. 38, Consolidated Statutes, [is] strictly within the 92d section of the British North America Act.

Weldon J. dissented, concluding that the provision similar to section 13(1) of *The Debtors Act, 1869* dealt with matters within the exclusive domain of the Parliament of Canada by virtue of section 91.27 of *The British North America Act, 1867*. Mr. Justice Weldon commented that obtaining by false pretences was a crime by Canadian law, and added that the provisions relied upon by the plaintiff, "although [they] may profess to be for the recovery of debts or for the enforcement of the payment of judgments, the Local Legislature cannot directly or indirectly make it a criminal offence, and punish in a summary manner by affidavits or testimony reduced to writing, and withdraw the protection which the Criminal Law casts around the person charged with such an offence".[184] He added that the "Local Legislature cannot, by engrafting such a section or Act for the recovery of debts, give themselves the power to pass such an enactment: it clearly belongs to the supreme authority of the Dominion to legislate upon, and they have done so".[185]

The view enunciated by the majority of the Court in *Ex parte Ellis* has been adopted in a number of subsequent decisions. For example, in *Re Dunn*,[186] section 27(1) of the Nova Scotia *Collection Act*[187] was found to be

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[183] *Ibid.*, at 598 (emphasis in original).

[184] *Ibid.*, at 600.

[185] *Ibid.*, at 601.

[186] *Re Dunn*, [1939] 4 D.L.R. 382, 14 M.P.R. 289 (N.S.S.C.) (subsequent references are to [1939] 4 D.L.R.). See, also, *Re Haddad* (1963), 49 M.P.R. 34 (N.S. Co. Ct.).

[187] S.N.S. 1933, c. 4. See, now, *Collection Act*, R.S.N.S. 1967, c. 39.

intra vires. This section, like the provision examined in *Ex parte Ellis*, provided for arrest of a defaulting judgment debtor where credit was obtained under false pretences. There Chisholm C.J. remarked as follows:[188]

> The aim of the proceedings under the statute and its amendments is, it seems to me, to enforce the payment of the debt, and the proceedings taken for that purpose are so different in aim and character from proceedings under the *Cr. Code* that I feel they cannot be regarded as proceedings in the criminal law as intended by s. 91 of the *B.N.A. Act*. They are not instituted by officers of the Crown; the Crown is not a party to them; and the order of the special examiner cannot successfully be invoked by a debtor indicted for false pretences as a plea of *autrefois convict*.

Interestingly, in the editorial accompanying the report of the decision in *Re Dunn*, the following question was raised:[189]

> The question might be asked why the Legislature confined the sanction of imprisonment to debts incurred by false pretences and other wrongful means, and the answer must surely be the reprehensibility of the debtor's conduct and the greater necessity in such cases of safeguarding the public by making such conduct subject to drastic consequences. The creditor of an unfortunate debtor as distinct from a dishonest one certainly has an equal interest in the enforcement of his claim.

More recently, the issue was canvassed in *Microwave Cablevision Ltd. v. Harvard House Capital Ltd.*[190] The provision under attack in that case was Rule 42(36)(*a*) of the British Columbia Supreme Court Rules 1976, which states as follows:

> 42.-(36) If it appears to the examiner that the debtor,
>
> (*a*) with intent to defraud the creditor, has made or caused to be made any gift or delivery or transfer of property, or has removed or concealed property,
>
> . . . .
>
> then
>
> (*d*) if the examiner is a Master or Registrar, he may make a report of his findings and fix a time and place for the person subpoenaed to appear before the Court, and at that time and place the creditor may apply without notice for committal, or
>
> (*e*) if the examiner is the Court, the examiner may order committal.

Meredith J. concluded that the purpose of Rule 42(36) is "to force a debtor to pay where it is to be presumed that he has the means to do

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[188] *Re Dunn*, supra, note 186, at 386.

[189] *Ibid.*, at 382-83.

[190] (1979), 17 B.C.L.R. 382, [1980] 3 W.W.R. 83 (S.C.) (subsequent references are to 17 B.C.L.R.).

so".[191] In distinguishing proceedings under Rule 42(36) from criminal proceedings, Mr. Justice Meredith remarked as follows:[192]

> The proceedings concerning committal orders under R. 42 differ fundamentally from sentences to imprisonment imposed under the criminal law or even from orders of committal in contempt proceedings. Under R. 42 the creditor has conduct of the enforcement of the order, he can forestall execution of the order for up to a year, he can nullify the effect of the order by non-payment of the debtor's board and he can effect the release of the debtor from prison at any time without reference to the court. The debtor himself is released from the order automatically on payment of the debt. Additionally, the rule requires that before the execution of any order of committal the debtor must be brought before the court so that, if shown to be warranted, execution of the order may be stayed. Furthermore, and most important, committal orders obtained under R. 42 are obtained by a process of inquisition, a process altogether foreign to the criminal law.

He then continued with his analysis:[193]

> The wording of R. 42(36)(*a*) comes from s. 151 [repealed 1976, c. 33, s. 71] of the County Courts Act. Similar wording was employed in the Arrest and Imprisonment for Debt Act. The mention of fraud suggests criminality, especially since the wording is the same as is contained in s. 350 of the Criminal Code, R.S.C. 1970, c. C-34. Section 151 of the County Courts Act may well have presented a constitutional problem for it contained a provision calling not only for imprisonment for fraudulent concealment of assets but also for debts fraudulently contracted.[194] Since the enactment of the rules and the repeal of portions of the County Courts Act and of the Arrest and Imprisonment for Debt Act, fraud in contracting debts is now left to the exclusive purview of the criminal law.
>
> I think R. 42(36)(*a*) simply provides instances of refusal to pay under para. (*b*) of the same subrule. A person, having had the means, who neglected or refused to pay his debts under para. (*b*) or, having had means, fraudulently concealed, etc., assets under para. (*a*) and thus refused to pay, will be presumed to have the means to pay. This presumption is inherent in the heading to R. 42(36): 'Debtor Unreasonably Refusing to Pay'. It is unlikely where the debtor has deliberately refused to pay that his present means to do so will be disclosed by examination. Rule 42(36) therefore effectively places the onus on the debtor who has been in fraud or neglect to show that he cannot pay on pain of imprisonment if he fails to do so.
>
> As I have said, I conclude that the purpose of the relevant rules is enforcement of judgments, not punishment per se, and that the rules are therefore within the legislative competence of the province.

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[191] *Ibid.*, at 386.

[192] *Ibid.*

[193] *Ibid.*, at 387.

[194] What is particularly interesting about these last passages is the suggestion that a provision calling for the imprisonment of a debtor on the grounds of fraudulently incurring the debt in question "may well have presented a constitutional problem": *ibid.*, at 386. There is no reference in the judgment of Meredith J. to the earlier cases of *Ex parte Ellis*, *supra*, note 179, and *Re Dunn*, *supra*, note 186, where this very issue arose and where the Courts found the legislation in question *intra vires*.

It should be noted that questions were raised by the Royal Commission Inquiry into Civil Rights (the McRuer Commission)[195] concerning the constitutionality of provisions of *The Division Courts Act*[196] similar to those considered by the Courts in *Ex parte Ellis*, *Re Dunn*, and the *Microwave Cablevision* case. Section 132 of *The Division Courts Act*, the precursor to the present *Small Claims Courts Act*, provided that, if it appeared to a judge on a judgment summons that the debtor,

> (*c*) obtained credit from the judgment creditor or incurred the debt or liability under false pretences, or by means of fraud or breach of trust; or
>
> (*d*) has made or caused to be made any gift, delivery or transfer of any property, or has removed or concealed any property with intent to defraud his creditors or any of them; or
>
> (*e*) had, when or since judgment was obtained against him, sufficient means and ability to pay the debt or damages or costs recovered against him, either altogether or by the instalments that the court in which the judgment was obtained ordered, without depriving himself or his family of the means of living, and that he has wilfully refused or neglected to make payment as ordered,
>
> the judge may order him to be committed to the jail of the county in which he resides or carries on business, for any period not exceeding forty days.

The McRuer Commission recommended the abolition of the power of committal in the above circumstances.[197] This was done in 1969.[198]

Somewhat similar constitutional issues have arisen in the context of the enforcement of support and maintenance orders. In *Regina v. Kirkpatrick Ex parte Gutsch*,[199] the validity of the show cause proceedings, and imprisonment pursuant thereto, available under *The Children's Maintenance Act*[200] was attacked. This Act imposed an obligation on every parent to maintain his or her child, and made it an offence for a parent to fail to do so. The *Criminal Code* then in force, as is the case with the present *Criminal Code*,[201] made it an offence for anyone under a legal duty to provide necessaries to fail to do so, thereby leaving the person to whom the duty is owed "in destitute or necessitous circumstances".[202]

Ferguson J., after a review of the relevant provisions of *The British North America Act, 1867*, noted that the provincial legislation, while over-

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[195] Province of Ontario, Royal Commission Inquiry into Civil Rights, *Report No. 1* (1968), Vol. 2, at 639.

[196] R.S.O. 1960, c. 110.

[197] *Supra*, note 195.

[198] *The Division Courts Amendment Act, 1968-69*, S.O. 1968-69, c. 30, s. 6.

[199] *Regina v. Kirkpatrick Ex parte Gutsch*, [1959] O.R. 539 (H.C.J.).

[200] R.S.O. 1950, c. 52, s. 2.

[201] R.S.C. 1970, c. C-34.

[202] *Ibid.*, s. 197(2)(*a*)(i).

lapping with the provisions of the *Criminal Code*, did not deal with precisely the same matter. There was no question that the Province had the authority to enact legislation imposing an obligation on parents to support their children and, as a result, there could be "no objection to the validity of a provincial statute that . . . creates a new offence if the penalty is imposed to enforce an obligation which the Province is entitled to impose. It may be provincial criminal law, but it is not *ultra vires* unless it precisely overlaps a field occupied by the Dominion".[203]

Ferguson J. also noted the existence of similar enforcement provisions in the Province's *Deserted Wives' and Children's Maintenance Act*,[204] and then added the following comments:[205]

> Penalties for failure to observe civil obligations are not uncommon in the laws of this Province. For example, it has never been contended that the provisions of the Division Courts Act which provide that a debtor may be imprisoned for his failure to meet the legal obligation imposed by a Division Court judgment against him are *ultra vires* of the Province as being criminal law. The Division Courts Act provides that in proper circumstances if the debtor had, when or since the judgment was obtained against him, sufficient means and ability to pay the debt or damage or costs recovered, the Judge may order him to be committed for any period not exceeding 40 days. The Master & Servant Act confers in appropriate circumstances the same powers on a magistrate who has made an award under that Act against an employer.

As can be seen from the preceding discussion, there would appear to be little doubt that provincial legislation that authorizes the arrest and imprisonment of a judgment debtor for failure to pay a money judgment, or for actions aimed at frustrating the enforcement efforts of his judgment creditor, would be held to be *intra vires* or constitutionally valid, at least insofar as the legislation does not seek to deal with fraudulent conduct on the part of the debtor. The object of such legislation, unlike similar federal legislation found in the *Criminal Code*, is the enforcement of judgments, not punishment of the debtor. The validity of such provincial legislation in this respect, however, does not guarantee that the legislation will be in accordance with the *Canadian Charter of Rights and Freedoms*.

The second basis upon which the constitutional validity of postjudgment arrest and imprisonment may be challenged is the *Canadian Charter of Rights and Freedoms*.[206] A number of the provisions of the Charter may be relevant. In the present context, undoubtedly the most significant provision of the Charter is section 7, which provides that "[e]veryone has the right to life, *liberty and security of the person* and the right not to be deprived thereof except in accordance with the principles of fundamental justice".[207] Reference should also be made to section 9 of the Charter: "Everyone has the right not to be arbitrarily detained or imprisoned."

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[203] *Regina v. Kirkpatrick Ex parte Gutsch*, *supra*, note 199, at 542.

[204] R.S.O. 1950, c. 102.

[205] *Regina v. Kirkpatrick Ex parte Gutsch*, *supra*, note 199, at 544-45.

[206] *Supra*, note 178. The Charter was proclaimed on April 17, 1982.

[207] Emphasis added.

Finally, sections 10, 11, and 12 of the *Canadian Charter of Rights and Freedoms* provide as follows:

> 10. Everyone has the right on arrest or detention
>
> (*a*) to be informed promptly of the reasons therefor;
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right; and
>
> (*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.
>
> 11. Any person charged with an offence has the right
>
> (*a*) to be informed without unreasonable delay of the specific offence;
>
> (*b*) to be tried within a reasonable time;
>
> (*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> (*e*) not to be denied reasonable bail without just cause;
>
> (*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; . . .
>
> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

A discussion of the applicability of these provisions to the postjudgment arrest and imprisonment remedies available at present in Ontario will be undertaken below. Before proceeding to this discussion, however, it may be useful to outline a few of the other Charter provisions.

First, regarding the applicability of the Charter, section 32(1) would seem to be the governing provision. This section reads as follows:

> 32.-(1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

There would seem to be general agreement that the effect of section

32(1)(*b*) is to make the Charter applicable to all laws – statutory as well as regulatory – within the authority of the legislature of the province.

The rights and freedoms described in sections 7, 9, 10, 11, and 12 of the Charter are not absolute. Rather, under section 1 of the Charter, it is made clear that these rights and freedoms are guaranteed "subject only to such *reasonable limits* prescribed by law as can be *demonstrably justified* in a free and democratic society".[208]

It is also important to note that those rights and freedoms described above are subject to the *non obstante* clause in the Charter of Rights. Section 33(1) of the Charter states that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter".

Finally, where there has been a violation of any of the rights or freedoms guaranteed by the Charter, the injured party "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances". This remedial provision of the Charter – section 24(1) – is very broad indeed. Section 52 of the Charter, it should be noted, provides that any law that is inconsistent with the provisions of the Constitution (including the *Canadian Charter of Rights and Freedoms)* is, "to the extent of the inconsistency, of no force or effect".

Turning, then, to the impact of the Charter on the postjudgment arrest provisions found in the *Fraudulent Debtors Arrest Act*,[209] and the *Family Law Reform Act*,[210] it is clear, by virtue of section 32(1) of the Charter, that this legislation must satisfy the standards established by sections 1 and 7, as well as perhaps sections 9, 10, 11, and 12 of the Charter. Clearly, a defaulting judgment debtor arrested and imprisoned under either of the two Acts mentioned above is deprived of his liberty. Accordingly, the first question to be considered is whether that deprivation would be "in accordance with the principles of fundamental justice", as required by section 7 of the Charter. In this respect, it will be convenient to refer once again to some of the relevant provisions of the *Fraudulent Debtors Arrest Act* and the *Family Law Reform Act*.

Looking, first, at the *Fraudulent Debtors Arrest Act*, it should be noted that an order for the imprisonment of a judgment debtor may be secured on an *ex parte* motion. Before a writ of *capias ad satisfaciendum* may issue, the judgment creditor must file an affidavit with the court indicating that a judgment in the amount of at least $100 has been secured and setting out the "facts and circumstances as [to] satisfy the judge that there is good and probable cause for believing either that the defendant, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his cred-

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[208] Emphasis added.

[209] *Supra*, note 1.

[210] *Supra*, note 78.

itors generally or the plaintiff in particular, or that the defendant has parted with his property or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution".[211] Section 32 may result in the judgment debtor being given a day's reprieve from arrest. It provides as follows:

> 32. The sheriff, at the request of the person arrested, and upon being prepaid a sum of money sufficient to cover the sheriff's reasonable fees and expenses incident to the delay, shall grant to such person a delay of twenty-four hours after the arrest before committing him to a correctional institution, and shall take him for the twenty-four hours to some safe and convenient house in his county.

Following his arrest, the debtor is provided with a number of methods of securing his release. First, the debtor may apply to be discharged under section 49 of the Act. At least ten days notice of the application for discharge must be given by the debtor to the person at whose instance he has been arrested. This ten day period is to allow the creditor to apply to have the debtor attend to be examined,

> for the purpose of discovering any property or effects that he is possessed of or entitled to, or that are in the possession or under the control of any other person for the use or benefit of the debtor, or that the debtor having been in possession of may have fraudulently disposed of for the purpose of hindering, delaying, defrauding or defeating his creditors, and touching the debtor's estate and effects and the circumstances under which he contracted the debt or incurred the liability that was the subject of the action in which judgment has been recovered against him, and as to the means and expectations he then had, and as to the property and means he still has, and as to the disposal he may have made of any of his property.[212]

Once he has been examined, or where no order for the debtor's examination has issued within the ten day period, the debtor, upon swearing "that he is not worth $20, exclusive of his goods and chattels exempt from seizure under execution"[213] and upon the court's being satisfied that his cross-examination, if any, is "satisfactory", will be entitled to be discharged. Secondly, it will be recalled that the debtor may also be discharged upon the consent of the creditor responsible for his arrest.[214]

With regard to imprisonment for non-payment of a maintenance or support obligation, the process begins with a default notice issued pursuant to section 28 of the *Family Law Reform Act*, which will normally require the defaulting maintenance debtor

(*a*) to file a statement of financial information referred to in section 23;

(*b*) to submit to an examination as to assets and means; and

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[211] *Fraudulent Debtors Arrest Act*, *supra*, note 1, s. 27(2).

[212] *Ibid.*, s. 50.

[213] *Ibid.*, s. 51(1).

[214] *Ibid.*, s. 56.

(c) to appear before the court to explain the default.

Under section 28(2), the debtor may be arrested if he fails to appear in accordance with the default notice, or "if the court is satisfied that the debtor cannot be served or intends to leave Ontario without appearing as required after being served". Such arrest is said to be "for the purpose of compelling attendance".

The main imprisonment provision is section 29 of the *Family Law Reform Act*. There is no express requirement that the debtor must be present in court before an order for his or her imprisonment is made; section 29(1) states simply that the debtor may be imprisoned "[w]here the debtor fails to satisfy the court that the default is owing to his or her inability to pay and where the court is satisfied that all other practicable means that are available under this Act for enforcing payment have been considered". It should be noted as well that section 29(2) empowers the court to make an order for imprisonment "conditional upon default in the performance of a condition set out in the order", for example, payment of the outstanding arrears within thirty days. Again, it is not clear from this section whether, before the debtor is imprisoned for failing to comply with the order, he is entitled to notice and a hearing at which he may seek to explain his default.

Postjudgment arrest of a maintenance debtor is also possible under section 24 of the *Family Law Reform Act*. Section 24 states as follows:

> 24. Where . . . a notice is issued under section 28 and a judge of the court is satisfied that the . . . debtor is about to leave Ontario, the judge may issue a warrant in the form prescribed by the rules of the court for the arrest of the . . . debtor.

As we have indicated, the warrant that would be issued under this section does require the debtor to be brought before the court as soon as possible. The Act, however, is silent concerning the debtor's right to secure his discharge; indeed, there does not appear to be any limitation on the period for which the debtor may be imprisoned in such a case.

Do the procedures under the *Fraudulent Debtors Arrest Act* and the *Family Law Reform Act* satisfy the standards established by the new *Canadian Charter of Rights and Freedoms*? Because of the Charter's very recent adoption, there is insufficient case law upon which to base a definitive answer to this question. However, it may be useful to see how similar issues have been treated by courts in the United States.

Under both the Fifth and Fourteenth Amendments to the United States Constitution, there is a prohibition against depriving any person "of life, liberty or property without due process of law". While the due process clauses are not identical to section 7 of the Charter, they are sufficiently similar that the cases decided thereunder may provide some indication of the considerations that Ontario courts will apply to section 7 of the Charter.

It would appear that the minimum protections that must be provided to a debtor about to be imprisoned for non-payment of a judgment debt are notice of the default proceedings and an opportunity to be heard.[215] In *Desmond v. Hachey*,[216] the Court found to be unconstitutional – because it violated the due process clause – a Maine statute that authorized the arrest and imprisonment of a debtor who failed to appear for a judgment debtor examination without affording the debtor an opportunity to be heard before his incarceration. The fact that the statute provided the debtor with the right to a hearing within two to ten days of his imprisonment was held by the Court not to be sufficient to satisfy the consitutional due process clause. The reasoning of the Court was as follows:[217]

> [The] Section . . . permits the arrest and imprisonment of the debtor, not because he has failed to pay the judgment debt, in which case it could be argued that he has had his day in court . . . but because he has failed to respond to the subpoena. Wilful failure to obey a court subpoena is unquestionably a contempt of court. . . . But inability to comply with a subpoena is a defense to the contempt charge.

The Court continued:[218]

> The evil attacked here is the summary imprisonment of one who, for whatever reason, fails to obey a disclosure commissioner's subpoena. Such a drastic infringment upon personal liberty cannot be tolerated unless the procedure is hedged about with sufficient safeguards to assure that one who is innocent of any wrongdoing will not be punished. Only a procedure which provides an opportunity for the debtor to explain, prior to incarceration, why he failed to obey the subpoena can adequately meet the constitutional imperative. Due process normally requires a hearing and an opportunity to present a defense before incarceration, and the fact that there is a subsequent procedure by which the debtor may obtain his release does not change the result.

The principle enunciated in *Desmond v. Hachey*, if applicable under section 7 of the *Canadian Charter of Rights and Freedoms*, could well render much of the *Fraudulent Debtors Arrest Act* inoperative, as well as the arrest and imprisonment for non-appearance powers under section 28(2) of the *Family Law Reform Act*. It will be recalled that, under section 27(2) of the *Fraudulent Debtors Arrest Act*, a debtor may be imprisoned pursuant to an order obtained *ex parte*. A debtor seeking a discharge under section 49 from an order of imprisonment must give the creditor ten days notice of his application. In this respect, at least, the *Fraudulent Debtors Arrest Act* is similar to the imprisonment provision at issue in *Desmond v. Hachey*.

Insofar as section 28(2) of the *Family Law Reform Act* is concerned,

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[215] For a discussion of the due process requirements in the case of imprisonment for debt, see Note, "Imprisonment for Debt and the Constitution", [1970] Law & Soc'y Rev. 659; Note, "Body Attachment and Body Execution: Forgotten but not Gone" (1976), 17 W. & M. L. Rev. 543; and Note, "Enforcement of Money Judgments and Divorce Decrees in Maine" (1972), 24 Maine L. Rev. 99.

[216] 315 F. Supp. 328 (S.D. Me. 1970).

[217] *Ibid.*, at 332.

[218] *Ibid.*, at 333.

while it would appear that arrest under that section is for the purpose of compelling attendance at a show cause hearing, the debtor would not seem to have the right to challenge his arrest on the basis that the alleged grounds for his arrest have not been satisfied. Moreover, it does not appear that there is any limit to the amount of time the debtor may be held pending the show cause hearing.

In two other cases from Maine, *Yoder v. County of Cumberland*[219] and *Lindsey v. County of Cumberland*,[220] the Courts found legislation permitting the incarceration of a defaulting maintenance debtor to be unconstitutional where the debtor was not provided with the right to a hearing to explain his default before incarceration. Again, as in *Desmond v. Hachey*, the Courts in the abovementioned decisions rejected the argument that the debtor's right to due process was protected by a post-incarceration hearing at which inability to pay might be established so that the debtor's freedom could be secured.[221]

Since, under section 29 of the *Family Law Reform Act*, the debtor would normally have an opportunity to establish his inability to pay before incarceration, this provision would not seem to contravene section 7 of the Charter. Where, however, the court has made a conditional order of imprisonment under section 29(2) of the *Family Law Reform Act*, it may not be in accordance with the principles of fundamental justice to imprison the debtor without giving him a further opportunity to explain his default.[222] Because the *Fraudulent Debtors Arrest Act* appears to provide a judgment debtor with only a post-incarceration hearing, it may be argued that the postjudgment imprisonment provisions of that Act contravene section 7 of the Charter – since the debtor, it could be said, is deprived of the right to liberty other than in accordance with the principles of fundamental justice – and therefore that the provisions are "of no force or effect".

Regarding the need for notice, a number of American cases have considered the nature of the notice that a defaulting debtor must be given

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[219] 278 A.2d 379 (Sup. Judicial Ct. Me. 1971).

[220] 278 A.2d 391 (Sup. Judicial Ct. Me. 1971).

[221] See, also, *Mills v. Howard*, 280 A.2d 101 (Sup. Ct. R.I. 1971); *Abbit v. Bernier*, 387 F. Supp. 57 (D. Conn. 1974); and *Singer v. Singer*, 382 N.Y.S.2d 793 (Sup. Ct. App. Div. 1976).

[222] In the American context, see, for example, *Ex parte Lee*, 568 S.W.2d 689 (Civ. App. Texas 1st Dist. 1978), and *Ex parte Mason*, 584 S.W.2d 936 (Civ. App. Texas 1979). The Commission has been advised that the common practice under section 29(2) is to adjourn the matter after a conditional imprisonment order has been made and to reopen the matter at a later date where the conditions of the order have not been satisfied.

For some English authorities on point, see *R. v. Clerkenwell Stipendiary Magistrates, Ex parte Mays*, [1975] 1 W.L.R. 52, [1975] 1 All E.R. 65 (D.C.); *R. v. Dudley Justices, Ex parte Payne*, [1979] 1 W.L.R. 891, [1979] 2 All E.R. 1089 (D.C.); *In re Hamilton; In re Forrest*, [1981] A.C. 1038, [1981] 3 W.L.R. 79, [1981] 2 All E.R. 711 (H.L.); and *R. v. Chichester Justices, Ex parte Collins*, [1982] 1 W.L.R. 334, [1982] 1 All E.R. 1000 (D.C.). These cases are concerned with conditional imprisonment orders made in connection with the non-payment of fines. The principles enunciated, however, would seem applicable to the present discussion.

before he can be incarcerated. It has been held, for example, that, to be meaningful, notice must include a statement of the purpose of the hearing, must make clear that the debtor may assert financial inability as a defence, and must outline the consequences of his failure to appear.[223] It should be noted that Form 43[224] under the *Family Law Reform Act* – the notice of a default hearing pursuant to section 28 of the Act – would seem to satisfy the American constitutional requirements for notice; the Form notifies the debtor of his need to appear and of the risk of arrest and imprisonment should he fail to appear or to satisfy the court of his inability to pay.

Even apart from the *Canadian Charter of Rights and Freedoms*, it may well be a requirement under the common law doctrine of fairness that a defrauding debtor have notice of the imprisonment proceedings and an opportunity to be heard. For example, in the recent case of *Re Crossfield and The Queen in Right of British Columbia*,[225] one of the issues before the Court was whether the debtor was entitled to receive a copy of the instalment order, in respect of which he was alleged to be in default, before he could be imprisoned for breach thereof. It was argued that it was sufficient that the debtor had notice of the show cause proceedings at which the instalment order was made. Esson J. rejected this contention on the grounds of fairness, even though service of the order was not expressly required by the statute:[226]

> So, it is argued, he had a kind of constructive notice. That approach is not supported by the words of the section, by the common law as it relates to proceedings for committal, or even by the pragmatic considerations which are said to justify a 'liberal construction'. The purpose of s. 67 is not to provide for punishment of those who do not make their maintenance payments but to provide an effective machinery to enforce payment by those who have shown themselves laggard in meeting their obligations. With some people, the specific threat of a jail term may be the most effective means of persuading them to meet their obligations. But, quite apart from considerations of fairness, the pressure created by the threat of imprisonment is most likely to have its effect if the person knows exactly what obligation must be met.
>
> In any event, considerations of fairness cannot be ignored in matters of this kind. The circumstances of this case illustrate how unfair the rule of 'constructive notice' would be. The proceedings were carried on hundreds of miles from where Mr. Crossfield lived and worked. On being served in Prince George with notice of a proceeding in Richmond, he had to decide whether to attend the hearing at an expense of hundreds of dollars in travel costs and lost wages or to leave it to the Court to decide in his absence what order should be made with respect to the arrears. It was not unreasonable for him to assume that, in due course, he would be advised what order had been made.[227]

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[223] *Darbonne v. Darbonne*, 379 N.Y.S.2d 350 (Sup. Ct. 1976). It is interesting to note that, in *Garland v. Garland*, 321 A.2d 808 (Ct. App. Maryland 1974), the Court concluded that it was not a denial of the debtor's right of due process that the notice failed to indicate that the court could consider failure to pay after the date of the creditor's application. See *Das v. Das* (1978), 21 O.R. (2d) 701, 93 D.L.R. (3d) 638 (Prov. Ct. (F.D.)) for a similar result.

[224] Rules of the Provincial Court (Family Division), *supra*, note 82.

[225] (1982), 133 D.L.R. (3d) 408 (B.C.S.C.).

[226] *Ibid.*, at 416-17.

[227] The comments of Esson J., it may be argued, are equally applicable to the kind of notice received by the maintenance debtor and approved by the Court in *Das v. Das*, *supra*, note 84.

Esson J. also commented as follows on the need for a hearing before a warrant of committal could issue in the circumstances of this case:[228]

> I do not decide, because the question does not arise on the facts of this case, whether there must be a further hearing before a warrant of committal can issue. There must be proof that the specified amount of arrears was not paid by the specified date, and of knowledge of the existence of the obligation to make that payment. Having in mind the policy of the legislation, and the traditional approach to committal for breach of civil obligations, there are strong arguments in favour of the view that the person allegedly in default should have an opportunity, before committal, to contest the facts or show that, by reason of illness or unemployment or other change in circumstances, the default was not wilful. It is true that any person has the right to apply to vary an order to meet changed circumstances, but that right may be of limited value to a person unfamiliar with legal procedures, particularly one who lives hundreds of miles from the Court. Furthermore, that right does not meet the case where the apparent default results from an error in the Court registry, a cheque being lost in the mails or some other breakdown in the system.

There may be additional grounds upon which to challenge the constitutional validity of the postjudgment arrest and imprisonment provisions of the *Fraudulent Debtors Arrest Act*. For example, section 10(*b*) of the Charter provides that everyone has the right on arrest or detention "to retain and instruct counsel without delay and to be informed of that right". It may be argued that this provision not only gives everyone the right to employ counsel, but also imposes an obligation on the state to provide counsel to those who are indigents. This right would be similar to the right to counsel under the Sixth Amendment to the United States Constitution. Recently, courts in Alaska,[229] Washington,[230] and Ohio[231] have held that there is a right to counsel both in civil contempt and in criminal contempt proceedings. The courts saw no reason to distinguish between civil and criminal contempt, since both can result in a loss of liberty. On the other hand, courts in Michigan,[232] Ohio,[233] Maine,[234] New Hampshire,[235] and North Carolina[236] have concluded that civil contempt proceedings do not give rise to a right to counsel.

Another avenue of attack would be reliance upon section 11(*d*) of the Charter, which entitles any person charged with an offence "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". Of course, the first

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[228] *Supra*, note 225, at 417.

[229] *Otton v. Zaborac*, 525 P.2d 537 (Sup. Ct. Alaska 1974).

[230] *Tetro v. Tetro*, 544 P.2d 17 (Sup. Ct. Wash. 1975).

[231] *Mastin v. Fellerhoff*, 526 F. Supp. 969 (S.D. Ohio 1981), and *Young v. Whitworth*, 522 F. Supp. 759 (S.D. Ohio 1981).

[232] *Sword v. Sword*, 249 N.W.2d 88 (Sup. Ct. Mich. 1976).

[233] *Retz v. Retz*, 405 N.E.2d 313 (Ct. App. Ohio 1978).

[234] *Meyer v. Meyer*, 414 A.2d 236 (Sup. Ct. Me. 1979).

[235] *Duval v. Duval*, 322 A.2d 11 (Sup. Ct. N.H. 1974).

[236] *Jolly v. Wright*, 265 S.E.2d 135 (Sup. Ct. N.C. 1980).

hurdle that would have to be overcome would be to convince the court that failure to comply with a maintenance or support order, thereby subjecting the defaulting debtor to a term of imprisonment, constitutes an "offence" for the purposes of section 11. While it may be strongly argued that imprisonment for non-payment of a maintenance or support order is an attempt to enforce compliance rather than to punish the debtor, from the imprisoned debtor's point of view this is a distinction without a difference. If a court were to find that section 11 is applicable, it might be contended that the "reverse onus" provision found in section 29(1) of the *Family Law Reform Act* is unconstitutional.

An argument based on section 12 of the Charter – proscribing cruel and unusual punishment – may also be relied upon as a basis for challenging the constitutionality of postjudgment arrest and imprisonment provisions. It may be contended, for example, that less severe penalties could elicit payment,[237] or that the penalty of imprisonment for non-payment of a judgment, maintenance order, or support order is disproportionate to the "wrong" committed.[238] These arguments, it is suggested, are less likely to be successful than those discussed above.[239]

Assuming that the *Fraudulent Debtors Arrest Act* or the *Family Law Reform Act* contravenes one or more provisions of the Charter, it must be remembered that this need not necessarily mean that the Act, or some of its provisions, will be rendered inoperative, for the legislation may be saved by section 1 of the Charter, which provides as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It may be argued, for example, that it is a reasonable limit on the right to liberty and on the right not to be deprived thereof except in accordance with the principles of fundamental justice to permit a debtor to be arrested and imprisoned without prior notice where the arrest is to prevent the debtor from leaving the jurisdiction without appearing to be examined or

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[237] This argument was used in *Furman v. Georgia*, 408 U.S. 238 (1972), at 342, the famous decision of the United States Supreme Court concerned with capital punishment.

[238] See, for example, *Weems v. U.S.*, 217 U.S. 349 (1910), and *Rummel v. Estelle*, 100 S. Ct. 1133 (1980).

[239] See, for example, *Grimes v. Miller*, 429 F. Supp. 1358 (D.N.C. 1977), aff'd 98 S. Ct. 600, where the Court concluded that a term of imprisonment of 49 days to compel disclosure under the North Carolina postjudgment body execution legislation, pursuant to a finding of fraud, was not cruel and unusual punishment. See, also, *Kelly v. Schoonfield*, 285 F. Supp. 732 (D. Maryland 1968), and *State v. Hampton*, 209 So.2d 899 (Sup. Ct. Miss. 1968), where imprisonment for 60 days and two years, respectively, for non-payment of fines was held not to be cruel and unusual punishment.

For some Canadian cases in which the cruel and unusual punishment prohibition of the *Canadian Bill of Rights*, R.S.C. 1970, Appendix III, s. 2(*b*), was relied upon, see *R. v. Natrall*, [1973] 1 W.W.R. 608, (1972), 9 C.C.C. (2d) 390 (B.C.C.A.), and *R. v. Jung* (1976), 1 C.R. (3d) S.-1 (B.C.C.A.). The challenge to imprisonment for default in paying a fine was rejected in both cases.

with the intent of defrauding his creditors. The balancing of interests in such cases may result in the rights of the debtor being sacrificed to some extent, for not to do so could result in rendering meaningless the efforts to arrest the debtor. Giving an absconding debtor notice of an application for his arrest may simply encourage him to leave the jursidiction sooner than he planned. The same kind of reasoning might apply to permit the arrest and imprisonment of a debtor, without a hearing, where it is alleged that the debtor "has parted with his property or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution". If, for example, the debtor has transferred only some of his property before the application for his arrest, notice to the debtor of the application may enhance the possibility that he will dispose of the rest of his property so as to frustrate his creditors.

In the family law context particularly, it may be argued that there is a "compelling state interest" in imprisoning defaulting debtors without providing them with all the safeguards of fundamental justice. However, in *Yoder v. County of Cumberland*,[240] referred to earlier, the Court rejected the contention that imprisonment of a defaulting support debtor without a hearing is justified because of the need to ensure the support of one's spouse (or ex-spouse) and children. The Court commented as follows with respect to this issue:[241]

> To the extent that §722 makes irrelevant the reason for non-payment of the 'support' and thereby is sufficiently broad to authorize summary incarceration of persons who are *truly powerless* to provide 'support' because of honest indigency – as the instant case strikingly demonstrates, – a State interest of ensuring family support is unfulfilled by summary incarceration. It is more likely to be defeated since during the period of incarceration the person intended by the State to be the family 'provider' is denied any opportunity to make himself able to be a provider . . . . The statute thus cuts a swath much beyond the legitimate necessity of the State's interest to ensure family support and maintenance.
>
> Furthermore, there is missing a rationally close connection between mere non-payment of 'support' and those special factors which the law of Maine recognizes as justifying incarceration of the body relative to adjudicated civil obligations to pay money – availability of assets and refusal to allow their use of payment, or the dishonest manipulation of assets to make them unavailable. Mere non-payment of 'support' fails to yield a rational conclusion that the non-payment probably resulted from dishonest handling of assets or obstinate refusal by 'debtor' to make assets, which he in fact has, [available] to satisfy the obligation of 'support'. Thus, a compelling State interest requiring incarceration prior to hearing is absent *generally* under §722; . . .

We shall discuss in more detail below the effectiveness of postjudgment arrest and imprisonment as an enforcement remedy.

In summary, insofar as the use of imprisonment as an enforcement remedy is concerned, the issue is not one of traditional constitutionality,

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[240] *Supra*, note 219.

[241] *Ibid.*, at 387-88 (emphasis in original).

but rather the procedural safeguards that must be guaranteed to a defaulting debtor in such a case by the *Canadian Charter of Rights and Freedoms*. Generally speaking, it can be argued strongly that, before he is imprisoned for non-payment of his judgment debt, the debtor should have a right to be heard, and in some cases a right to notice. Conditional imprisonment orders, such as those available under section 29(2) of the *Family Law Reform Act*, which result in imprisonment upon non-compliance without a further hearing, may be suspect under section 7 of the Charter. It is also possible to argue that section 10(*b*) requires that an indigent judgment debtor be provided with counsel. A "reverse onus" provision, such as that found in section 29(1) of the *Family Law Reform Act*, may be in contravention of section 11(*d*) of the Charter. In short, postjudgment arrest and imprisonment of defaulting judgment debtors, whether or not maintenance debtors, gives rise to serious questions under the Charter, the answers to which, at this time, are far from certain.

9. POSTJUDGMENT ARREST AND IMPRISONMENT: THE EVIDENCE

It would be remiss to turn to recommendations for reform concerning the law of postjudgment arrest and imprisonment without considering the available evidence concerning its impact and effect. In this section, we shall examine the evidence referred to by the English *Report of the Committee on the Enforcement of Judgment Debts*[242] and the Australian Government Commission of Inquiry into Poverty Report, *Debt Recovery in Australia*,[243] which contains, *inter alia*, statistical information on the use of imprisonment in the State of South Australia. Both of these studies deal with postjudgment arrest as a method of enforcing judgments other than maintenance or support orders. With respect to imprisonment for non-payment of a maintenance or support order, we shall review the expanding body of literature and empirical data – both Canadian and American – dealing with the efficacy of this enforcement remedy.

The *Report of the Committee on the Enforcement of Judgment Debts* examined in some detail the evidence available concerning the use of imprisonment for debt. It will be recalled that the Committee concluded that a great many of the debtors who are imprisoned are "inadequate, unfortunate, feckless or irresponsible persons".[244] It should be pointed out, however, that, prior to 1970, the remedy of arrest and imprisonment under *The Debtors Act, 1869*, at least on its face, seems to have been somewhat broader than the "inability to pay" language of section 29 of the Ontario *Family Law Reform Act*.[245] While the Payne Committee under-

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[242] Payne Committee Report, *supra*, note 116.

[243] Australian Report, *supra*, note 118.

[244] Payne Committee Report, *supra*, note 116, para. 282, at 252.

[245] Section 5(2) of *The Debtors Act, 1869*, *supra*, note 17, it will be recalled, permits imprisonment "where it is proved . . . that the person making default either has *or has had since the date of the order or judgment* the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same" (emphasis added).

In practice, however, it seems that some Ontario provincial court (family division) judges order imprisonment in cases where the debtor had the means to pay and

took no statistical survey of its own, it relied on existing sources indicating, for example, that imprisoned debtors, "[a]part from knowing little or nothing about the details of their indebtedness or their financial position generally . . . were often unable to give coherent accounts of their employment history".[246] The Payne Committee Report set out the following summary of the views of the governors of prisons receiving debtors imprisoned under *The Debtors Act, 1869*:[247]

> [T]hey present an almost unanimous view that the majority of civil debtors in prison are social inadequates, people incapable of managing their affairs and overwhelmed by a burden of debt. Investigators say that they are left with an over-riding impression of the low mental calibre of these debtors who are people unable to understand how and why they were found in prison. The governors describe them as physically, mentally and socially inadequate, unreceptive and unresponsive. Some of them report that imprisonment had no deterrent effect and that trading concerns should be compelled to investigate a debtor's credit-worthiness before accepting him as a customer. The view is also expressed that, whilst a first term might, in a few cases, be successful in persuading an individual to pay, in the majority of cases the sanction is of no value. The general view is that imprisonment for debt is uneconomic and futile. The expenditure in time, work and money on the debtor part of the prison population is out of all proportion to the size of their individual debts. In many cases the amount of the debt for which a man has been imprisoned is astonishingly small compared with the expenditure of public money and official work involved in the few days of imprisonment.

The Committee noted that during the years 1962 to 1967 the number of debtors imprisoned under orders of the county court decreased from a high of 7,913 in 1962 to 3,329 in 1967. The lowest number of imprisonments was registered in 1966 – 3,155.[248] An analysis of some 2,500 committal warrants issued in 1965 revealed the following information. Slightly more than one-quarter of the debtors either avoided imprisonment by paying "at the prison gates" or were imprisoned more than one time. Over half of those imprisoned had an outstanding judgment debt of less than £20. The full term was served by most of those imprisoned.[249]

The figures amassed by the Payne Committee respecting imprisonment for non-payment of maintenance orders were startlingly different. The following statistics were gathered for a twelve month period in the High Court in London:[250]

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refused to do so, even though at the time of the committal hearing the debtor no longer is able to pay.

[246] Payne Committee Report, *supra*, note 116, para. 980, at 251, quoting from Morris, *Prisoners and their Families* (1965).

[247] *Ibid.*, para. 981, at 252.

[248] *Ibid.*, para. 991, at 255.

[249] *Ibid.*, para. 992, at 255.

[250] *Ibid.*, para. 1063, at 272-73.

Applications for maintenance etc. in the Divorce Division of the High Court in London. (This figure includes 818 applications for alimony pending suit, so that there may be some duplication)	2,591
Maintenance orders made in London and registered for enforcement in a magistrate's court	433
Judgment summonses issued in the High Court	125
Committal orders made	38
Committal orders issued by leave of the registrar	10
Respondents arrested	1
(Of the remaining 9 judgment debtors, 7 paid the debt, one was not traced and in the last the order was suspended pending appeal.)	
Number detained in prison	1 for 26 days

As in England, the rate of imprisonment for debt declined in South Australia between the years 1962-63 and 1973-74. The following table is set out in the Report on *Debt Recovery in Australia*:[251]

TABLE 3.8

Debt imprisonment, Adelaide Gaol, 1963-74

Fiscal year	*Number of debtors imprisoned at Adelaide Gaol (Males)*
1962-63	304
1963-64	234
1964-65	278
1965-66	250
1966-67	245
1967-68	234
1968-69	206
1969-70	147
1970-71	58
1971-72	93
1972-73	81
1973-74	75

The total number of warrants for imprisonment issued in 1973-74 relating to the Adelaide Gaol was 158; obviously, some debtors, at the last minute, found the wherewithal to pay their debts.[252] The *Debt Recovery in*

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251 Australian Report, *supra*, note 118, at 51 (footnote references omitted).

252 *Ibid.*

Australia Report sought to break down the warrants by the amounts in issue. The results are reflected in the following table:[253]

Amounts in dollars	*0-20*	*21-50*	*51-100*	*101-150*	*151-200*	*201-300*	*301-400*	*401-500*	*501-1000*	*Over 1000*	*Totals*
Number of warrants	12	40	30	21	16	12	14	5	6	2	158
Percentage of warrants	7.6	25.3	19.0	13.3	10.1	7.6	8.9	3.2	3.8	1.3	

It is interesting to note that most of the warrants pertain to debts under $100.

Other information gleaned by those investigating imprisonment in South Australia included the following: generally speaking, debtors showed relatively low standards of comprehension, both of enforcement procedures and of the advice facilities available to them; as in the case of the Payne Committee, the Australia Government Commission of Inquiry into Poverty indicated that imprisoned debtors, as a class, had a high level of unemployment, in part as a result of imprisonment; and the income of those imprisoned was at the low end of the income scale.[254] Based on the above information, the Commission concluded, like the Payne Committee before it, that "[t]he vast majority of those gaoled by the debt enforcement system in South Australia are at the lower economic and educational levels and are subject to high rates of unemployment. Once in debt they are among the least equipped in society, both financially and in other ways, to deal with their problems."[255]

The literature and studies respecting imprisonment for non-payment of maintenance or support orders are useful in a number of respects. They indicate the complexity of the problems inherent in the enforcement of maintenance orders, the extent of the resort to the remedy of imprisonment, and contain some evidence of the effectiveness of this remedy in securing payment.

A recent study by the Alberta Institute of Law Research and Reform, entitled *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved*,[256] contains useful information concerning the nature of the problems surrounding the enforcement of support orders. The description that follows is taken, for the most part, from Volume 1 of the study, the *Summary Report*.

The study conducted by the Alberta Institute of Law Research and Reform examined the family court records in four Alberta cities, Edmonton, Calgary, Lethbridge, and Grande Prairie, and the Supreme Court

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[253] *Ibid.*, at 60.

[254] *Ibid.*, at 62-64.

[255] *Ibid.*, at 65.

[256] Alberta Institute of Law Research and Reform, *Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved* (1981) (hereinafter referred to as "Alberta Matrimonial Support Report").

records in Edmonton and Calgary. In addition, three other subsidiary studies were carried out involving door-to-door surveys of men and women involved with matrimonial support orders, and a study of defaulters. With respect to the findings, the *Summary Report* stated as follows:[257]

— The survey of women indicated that about half of all maintenance orders in Calgary were paid up at the time of the study. However only about a third of the ex-husbands paid their orders every month and in the full amount. About 30% of the women interviewed said that their husbands/ex-husbands had paid nothing in the past year.

— Thirty-eight percent of the Edmonton and Lethbridge cases had made all their payments over the duration of the case. Twenty-three percent of the Edmonton and 7% of the Lethbridge cases had made no payments at all over the duration of the cases.

— Enforcement proceedings are commonly initiated in Family Courts: 87% of the cases in Edmonton and 74% in Calgary showed evidence of some enforcement.

— There was some evidence that enforcement proceedings are [not] followed through in many instances. Forty percent of the Edmonton cases contained unserved summonses [and] 14% contained unserved warrants.

— About 70% of a random sample of defaulters in Edmonton and Calgary were traced without using extensive tracing procedures.

— There was some evidence that poor record-keeping affected enforcement. The initiation of enforcement was more common in the 54% of cases in which researchers were able to locate ledger cards in Calgary than the cases for which no ledger card could be found.

— The survey of women indicated that there is a lack of faith in the efficiency of enforcement among many women and that this may cause some not to file a complaint.

— Comments made by men suggest that better enforcement may lead to considerable resistance.

— Low income appeared to be associated with irregular payment of maintenance orders but not with non-payment in the survey of men.

— Maintenance orders for marriages of long duration were better paid than for marriages of short duration.

— There was some evidence that larger maintenance orders were better paid than smaller orders.

— There was no statistical evidence that dissatisfaction with access arrangements was associated with irregular or non-payment. However there were some respondents in the men's survey who gave this as their most important reason.

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[257] *Ibid.*, Vol. 1, at 3-4.

— The majority of both men and women interviewed gave a continued sense of responsibility for the children as the main reason for regular payment.

— Fear of enforcement proceedings was not a major reason for payment among men.

— Inability to afford payments was a major reason given by men for non-payment. However, the question of 'affordability' is relative: it depends upon the priority accorded by men to maintenance obligation[s] relative to other financial obligations.

. . . .

— There was widespread dissatisfaction with the legal proceedings connected with the granting of awards and enforcement by both men and women.

These findings indicate that the problem of matrimonial support failures is a complex one that is not necessarily amenable to simple solutions.

Turning to the findings of the study in more detail, and particularly as they relate to the use of imprisonment as an enforcement remedy, some of the information revealed by the Alberta study is very interesting indeed. For example, it would appear that there is resort to the remedy of imprisonment in a significant number of cases: "[e]ight percent of Calgary cases and 12% of those in Edmonton contained at least one prison committal order in addition to the issuance of summonses and warrants. Fifteen percent and 11% of the Edmonton and Calgary cases had at least one warrant issued (but no prison committal order)."[258] In the case of the family courts in each of these two cities, a majority of cases resulted in the issuance of summonses, many of which, however, remained unserved.[259]

The Alberta study also found that a significant percentage of the respondents to one of the questionnaires was unwilling to initiate one or more enforcement measures. Approximately twenty-five percent to forty percent were unwilling to have the amount of maintenance owed deducted by means of garnishment proceedings; over sixty percent of the women questioned were unwilling to resort to jailing for non-payment of maintenance.[260] The conclusions drawn from these responses and other comments were "that there is a lack of faith among many women concerning the effectiveness of enforcement proceedings. About one half of the women reported that their ex-husbands had not paid their orders regularly. When asked why this was the case, over a quarter said that the court would not be able to make him pay or that it was too much trouble for her."[261] On the other hand, there is also evidence that some of the women questioned believed that payments were forthcoming on a regular basis because of the husband's fear of legal proceedings.[262]

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[258] *Ibid.*, at 16.

[259] *Ibid.*

[260] *Ibid.*, Vol. 2, *Technical Reports*, Table 12, at 181-82.

[261] *Ibid.*, Vol. 1, at 18.

[262] *Ibid.*, Vol. 2, at 202 and 206.

In the survey of men conducted by the Alberta Institute, there is also some interesting data concerning the reasons given by the respondents for payment or non-payment of maintenance. Tables 12.3 and 12.4 of this survey set out the responses:[263]

TABLE 12.3

Why Maintenance Orders were Paid

The reasons for paying maintenance orders are ranked below by way of summary:

Percentage Agreeing		*Percentage Disagreeing*
76	Close to Children	11
75	Reponsibility for children	11
60	Preserve Goodwill	11
47	Doesn't like wife on social assistance	22
25	Ex-wife's standard of living lower	48
23	Fear of Legal Proceedings	31
20	Responsible for marriage breakdown	64
19	Fear of Garnishee	35
19	Wife always after him to pay	57
18	Fear of Imprisonment	40
18	Responsibility for ex-wife	73

TABLE 12.4

Why Maintenance Orders were not Paid Regularly and Promptly

Again, to summarize the feelings briefly, the reasons for not paying orders regularly are ranked below:

Percentage Agreeing		*Percentage Disagreeing*
63	Ex-wife has enough money to support herself	12
46	Can't afford to pay the Order	29
44	Money paid for children goes to ex-wife	19
44	Ex-wife was responsible for marriage breakdown	26
41	Standard of living lower than ex-wife's	32
34	Ex-wife spends money foolishly	21
34	Ex-wife has enough money to support herself and children	27
32	Provides for children in other ways	30
30	Never gets to see children	49
28	No longer feels close to children	46
15	Ex-wife agrees that she no longer needs money	41

[263] *Ibid.*, at 293.

From Table 12.3, it would seem that fear of legal proceedings – either in the form of garnishment proceedings or in the form of committal proceedings – played a less than major role in motivating payment. In the case of those who did not pay regularly, a lack of funds was a major reason for non-payment. In questioning those who did not pay, "[r]oughly a third of those answering said they would pay if threatened with legal proceedings or imprisonment, and only 21% said they would pay if threatened with a garnishee order. In each case, however, more said they would not pay when threatened with such enforcement than would pay."[264] Indeed, over forty percent disagreed that they would pay if threatened with imprisonment. The *Summary Report* summarized the responses of those who do not pay maintenance regularly as follows:[265]

> In summary, the findings with respect to the effectiveness of enforcement proceedings are inconclusive. Taking initial action is very common. The evidence seems to suggest that enforcement is less effective with each additional step in the process. If measures are taken to tighten enforcement when a default continues to occur, there is not [*sic*] indication in the findings that commensurate increases in payment will occur. If the opinions of the men surveyed were to be taken seriously, better enforcement may result in further resistance.

A 1981 British Columbia study of show cause enforcement of maintenance orders, prepared under the joint auspices of the Social Planning and Research Committee of the United Way of the Lower Mainland, and the Research and Evaluation Unit of the Policy Planning Division of the British Columbia Ministry of the Attorney General, also sheds some interesting light on the enforcement process in the family law context.[266] As in the case of Alberta maintenance orders, the study under discussion disclosed that "the large majority, about two-thirds of the cases, were in arrears".[267]

The degree of reliance upon show cause hearings for maintenance orders in default can be discerned to some extent from the fact that an average of 4.2 show cause summonses were issued per case in the sample; thirty-six percent of these summonses, slightly more than a third, could not be served.[268] It is interesting to note the average court time per show cause hearing – 9.3 minutes; where the hearing resulted in an order to pay, the average court time was slightly longer, averaging 16.4 minutes per hearing.[269]

Another interesting statistic found in the British Columbia study concerns the defaulting spouse's agreement or disagreement with the amount of alleged arrears: forty-five percent claimed (sometimes indirectly) that they were partly or wholly inaccurate.[270] This is not to suggest that the

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[264] *Ibid.*, Vol. 1, at 18.

[265] *Ibid.*

[266] Wachtel and Burtch, *Excuses: An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders* (April, 1981).

[267] *Ibid.*, at 1.

[268] *Ibid.*, at 16.

[269] *Ibid.*, at 23.

[270] *Ibid.*, at 28.

defaulters challenged that they were in arrears; the question, rather, was the extent of the arrears.

The British Columbia study, while concluding that show cause hearings fulfil many goals, nonetheless proposed that the jail sanction be replaced as the major lever in enforcement with other mechanisms, such as garnishment, attachment, and recourse to bankruptcy, *"which attempt to motivate the maintenance debtor to rearrange his financial affairs"*.[271] It is not clear why imprisonment does not serve this same function. Nor is there any indication why these other remedies should be utilized in place of jailing.

One point made in the British Columbia study that is worth repeating is the court's ambivalence to the argument made by many defaulters that they are overburdened by other large debts:[272]

> The court could be seen as affirming three general propositions: a) that respondents not beggar themselves to avoid their maintenance obligations; b) that support payments have first priority among debts; and c) that persons without the ability to manage their debts should be directed to counselling and legal relief. Nevertheless, some men countered successfully that it was in no one's interests to pauperize them or ruin their chances of future income by forcing them to liquidate their remaining assets. *So long as the business code – which stresses that a man must meet his business obligations – takes social precedence over (and has more severe personal consequences than) private family responsibilities, the court should expect some resistance.* Certain defaulters clearly see it as in their best interests to choose the less threatening road of neglecting family obligations. At present, maintenance enforcement hardly compares with general debt collection, restricted credit, and so forth in its personal implications. The court's only option to restore the family to its preferred creditor position, if personal bankruptcy seems warranted, is to put the respondent in touch with financial counsellors.

With respect to the effectiveness of imprisonment as a means of enforcing maintenance orders, Chambers, in a study of the use of imprisonment in the State of Michigan, concluded that, given a certain set of circumstances, imprisonment was a valuable enforcement tool.[273] He commented:[274]

> [T]he lesson of our study appears to be that given the opportunity, many men will not pay, but that if a state sets up a system that is well organized and persistent and that relies on a substantial level of jailing, lots of money can be collected. When there is a policeman at everyone's elbow, fewer candy bars are shoplifted.

Chambers' study suggested that there were three factors that were crucial to the level of debt collection in any particular Michigan county. "The

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[271] *Ibid.*, at 69 (emphasis in original).

[272] *Ibid.*, at xii-xiii (emphasis in original).

[273] Chambers, "Child Support Collections in Michigan – A Study of the Effects of Tenacity and Terror", in Baxter and Eberts (eds.), *The Child and The Courts* (1978) 129 (hereinafter referred to as "Chambers"). See, also, Chambers, "Men who Know They Are Watched: Some Benefits and Costs of Jailing for Non-Payment of Support" (1977), 75 Mich. L. Rev. 900, and Chambers, *Making Fathers Pay: The Enforcement of Child Support* (1979).

[274] Chambers, *supra*, note 273, at 130.

first factor was population – the larger the county, the lower the collections."[275] A second factor pinpointed by Chambers as having a significant impact on the level of collection was the nature of the enforcement process, that is to say, the existence or non-existence of the equivalent to our system of automatic enforcement.[276] And finally, the rate of jailing affected the rate of collection. "Counties that jailed more, collected more."[277] These three factors, to some extent, were interrelated: "a self starting enforcement policy seems to lead to the apprehension of more nonpaying men who are then brought before the judges and jailed".[278] The following table sets out the findings of Chambers in this regard:[279]

Interrelation of Three Most Important Factors Relating to Collections in Twenty-Eight Michigan Counties

How much the county jails, whether Friend of the Court initiates enforcement without awaiting complaints, and county population

	Counties that were both high-jailing and self-starting		*Counties that were self-starting but low-jailing*		*Counties that were high-jailing but not self-starting*		*Counties that were neither high-jailing nor self-starting*	
Mean portion collected during survey period of all that was ordered	82%	69%	67%	62%	57%	59%	66%	57%
	5 small counties (under 100,000)	3 large counties (over 100,000)	5 small counties	1 large county	1 small county	3 large counties	2 small counties	8 large counties

Mean collections:

13 small counties (under 100,000) — 72%
15 large counties (over 100,000) — 60%

12 high-jailing counties — 71%
16 low-jailing counties — 61%

14 self-starting counties — 71%
14 non-self-starting counties — 60%

5 small, high-jailing, self-starting counties — 82%
8 large, low-jailing, non-self-starting counties — 57%

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[275] *Ibid.*, at 133.

[276] *Ibid.*

[277] *Ibid.*

[278] *Ibid.*

[279] *Ibid.*, at 134 (footnote references omitted).

Insofar as jailing itself was concerned, Chambers concluded that "[n]o index . . . that combined average sentence length with the rate of jailing or measured jail lengths alone helped to sort high from low paying counties in a way not fully and more adequately explained by the rate of jailing alone".[280] Nor did the evidence support the conclusion that long sentences were more likely than short sentences to induce the debtor to pay in order to secure early release from jail. Indeed, Chambers suggested that "length of time served remains a strong predictor of poor performance after release".[281]

With respect to the use and efficacy of imprisonment in Ontario, Baar and Moore, in a study published in 1981, examined the enforcement of child support orders in one family court in a large metropolitan area prior to the enactment of the *Family Law Reform Act*.[282] Their findings are relevant to the question whether imprisonment is necessary in a system employing automatic enforcement.

Only a small portion of the study was devoted to the use of imprisonment as a method of enforcing child support orders; the major focus of the study was an examination of the comparative effectiveness of automatic enforcement (introduced in Ontario in 1974) and self-initiated enforcement. For example, the following table compared the two types of enforcement regime by payment patterns:[283]

Type of Enforcement by Payment Patterns

	Type of Enforcement	
Number of Defaults	*Automatic (N = 100)*	*Non-Automatic (N = 100)*
None	11.3%	14.6%
4 or fewer	65.6%	59.5%
More than 10	20.6%	8.3%
Never paid	7.2%	11.5%
Length of Maximum Default		
One year or more	30.2%	36.7%

The only two areas in which automatic enforcement proved to be better were the last two; that is to say, where automatic enforcement was employed, there were fewer support orders in respect of which no payment was ever made, and fewer support orders where the length of default was one year or greater. These statistics, Baar and Moore suggested, indicated "that the automatic enforcement program is directed more toward limiting flagrant deviations than toward achieving a regular payment

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[280] *Ibid.*, at 136.

[281] *Ibid.*

[282] Baar and Moore, "Ineffective Enforcement: The Growth of Child Support Arrears" (1981), 1 Windsor Yearbook of Access to Justice 94.

[283] *Ibid.*, at 105.

pattern".[284] Baar and Moore also discovered that the amount of accumulated arrears was likely to be less where self-initiated enforcement was employed.[285]

Automatic enforcement of support orders was more likely to result in the laying of informations. However, informations were more likely to be laid only after substantial arrears had accumulated.[286]

The evidence gathered by Baar and Moore concerning the efficacy of imprisonment in ensuring compliance with a support order supports their conclusion that there is "a considerably higher rate of compliance . . . at least on a short term basis, when there was certainty and severity of sanction".[287] However, the evidence indicated that reliance on imprisonment "resulted in irregular sanctioning of accumulated debt. Judicial effort . . . was directed toward the collection of lump sum payments rather than toward the achievement of a consistent payment pattern."[288] The authors concluded as follows:[289]

> Neither judgments based on the conflict model nor committals to jail that resulted from non-compliance, had the desired effect: neither process provided either a clear definition of the boundaries of the support obligation or certainty that the obligation was consistently binding. In fact, the judicial emphasis on lump sum payments coupled with administrative practices similarly focused, conveyed the message to the payor that consistent payment behaviour was not required. Thus the enforcement practices redefined the parameters of obligation. The nature of the obligation was to pay an indeterminate amount at a randomly defined point in time, hence a lottery system that may function in the interest of the payor was inadvertently created.

The same authors, Baar and Moore, have also examined the enforcement of child support orders following the enactment of the *Family Law Reform Act*. In an as yet unpublished study, they note that imprisonment,

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[284] *Ibid.*, at 106.

[285] *Ibid.* To explain the lack of success of automatic enforcement when compared with self-initiated enforcement, Baar and Moore examined a number of factors, such as the time between the making of the support order and the first warning letter or default notice, the amount of arrears at the time of the first warning letter or default notice, and the number of informations laid. From the evidence gathered, they concluded, for example, "that while those on automatic enforcement were more likely to receive a warning at some point during delinquency than those on non-automatic enforcement, this occurred only after a pattern of default had been well established": *ibid.*, at 109. They sought to explain this result in part by the possibility that court clerks perceived no need for a notice where the amount in default was less than $100. Consequently, they suggested, "[t]here may have been a tendency then, to assign such orders low priority with the consequence that the court placed less emphasis on prompt action that might have produced fruitful results. That is, a payor who had accumulated only a small debt may have been more likely to have the required funds and would be prompted to pay by notice from the court": *ibid.*, at 109. Account review, they suggested, was sporadic and, therefore, significant arrears were allowed to accumulate and a pattern of habitual delinquency was developing.

[286] *Ibid.*, at 112.

[287] *Ibid.*, at 119.

[288] *Ibid.*, at 117.

[289] *Ibid.*

as a method of enforcement, has decreased since the introduction of the new legislation. This is ascribed in part to the case law concerning section 29, which has resulted in that provision being strictly construed by the courts, thereby making imprisonment more difficult. Default in payment of support orders, on the other hand, has increased since the enactment of the *Family Law Reform Act*: twenty-eight percent of support orders do not result in any payment whatsoever.[290]

To gather some additional information concerning postjudgment arrest and imprisonment in the matrimonial context in Ontario, an in-depth study of the use of this remedy in the Provincial Court (Family Division) of the County of Kent and in the Provincial Court (Family Division) of the Judicial District of Waterloo was undertaken with the assistance of those courts. These two courts were selected in order to determine the incidence of resort to the remedy of postjudgment arrest and imprisonment and whether the remedy was used more frequently in rural or relatively small urban centres than in a large metropolitan centre. The study conducted involved final support orders made during the 1980 calendar year.

The results of the study conducted by the Provincial Court (Family Division) of the County of Kent are as follows. Of the 110 support orders issued under the *Family Law Reform Act* during 1980, ninety-seven were in default (defined as at least two consecutive payments in arrears) at some time from the date of their issuance to July 31, 1982. The vast majority of these orders were in default on only one occasion. In the case of fourteen orders, two defaults were registered. One 1980 support order was in default on seventeen different occasions. The total number of defaults in respect of the 1980 support orders examined was 149.

Default proceedings were taken in the case of seventy of the support orders in default, resulting in 132 different show cause proceedings. In nine cases, the default proceedings were dismissed on the ground of inability to pay. In a similar number of default proceedings (9), a committal order was issued. No support debtor was subject to more than one committal order. All nine committal orders were conditional. Each of these nine orders resulted in payment, thereby allowing the debtor to avoid imprisonment. In only one case was it necessary to resort to arrest of the support debtor. The average term of imprisonment ordered was twenty-seven days.

The amount of arrears outstanding in these nine cases ranged from $20 to $4,030, the median being $425. The average arrears outstanding was just over $1,000.

In every case, the debtor was present during the proceedings resulting in a committal order. In five of the nine cases, the debtor was not repre-

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[290] This information was provided to the Commission by Professor E. Baar, with the approval of the Attorney General for Ontario and the Chief Judge of the Provincial Court (Family Division).

sented by counsel. In only one case that resulted in a committal order did the creditor first employ some other enforcement remedy (attachment of wages).

Unfortunately, the results of the study undertaken by the Provincial Court (Family Division) of the Judicial District of Waterloo were unavailable at the time of publication.

The statistics outlined above suggest that the remedy of postjudgment arrest and imprisonment is not resorted to with any great degree of frequency in Ontario. Moreover, the data obtained from the Provincial Court (Family Division) of the County of Kent, as well as the study by Chambers, suggest that arrest and imprisonment can be used effectively to ensure payment of arrears of support or maintenance.

Finally, we should point out that every provincial court (family division) judge with whom we consulted, without exception, was of the opinion that arrest and imprisonment, or the threat thereof, is an effective and necessary remedy of last resort. They believed that it was the only remedy to which some recalcitrant debtors responded. In addition, at the request of the Commission, the Ontario Family Court Judges Association circulated among its members a questionnaire with respect to retention of the remedy of postjudgment arrest and imprisonment. The response was overwhelmingly in favour of retention, with a majority of those responding, however, expressing the view that this remedy should be resorted to infrequently.

10. CONCLUSIONS AND PROPOSALS FOR REFORM

Having surveyed the literature and available empirical data concerning the need for, and the efficacy of, postjudgment arrest and imprisonment as an enforcement remedy, the question that must now be addressed is what changes, if any, should be made to the present law. The first, basic issue that the Commission must consider is whether postjudgment arrest and imprisonment should be (a) abolished as an enforcement remedy, (b) available as a method of enforcing all judgments or orders for the payment of money, or (c) retained as a remedy for the enforcement of maintenance and support orders only.

Most of the arguments supporting either the abolition of the remedy of postjudgment arrest and imprisonment or its retention have been outlined in previous sections of this chapter. In the following section, we propose to summarize and evaluate briefly these arguments.

(a) Arguments Respecting Abolition: An Evaluation

One of the main arguments relied upon by the Payne Committee in support of its recommendation for abolition of postjudgment arrest and imprisonment other than in the family law context was the redundancy of this remedy. It was contended in the *Report of the Committee on the Enforcement of Judgment Debts* that, given the recommendations increasing the efficacy of other enforcement remedies and the recommendation to

make nearly all the property of a judgment debtor subject to enforcement, imprisonment was no longer needed.[291] If a debtor had non-exempt property, it could be reached by either execution, garnishment, or the appointment of a receiver. Judgment debtor questionnaires and examinations would be available to determine the debtor's means and the whereabouts of any property liable to be taken in satisfaction of a judgment debt.

It will be recalled that this Commission, like the Payne Committee, has sought to ensure that, subject to reasonable exemptions, all the property of a judgment debtor would be subject to enforcement.[292] The Commission has also recommended numerous changes designed to make existing enforcement remedies more effective.[293] Like the Payne Committee, this Commission has also made recommendations designed to improve the procedure for ascertaining whether a debtor has the means to pay his judgment debt and the whereabouts of the debtor's exigible assets.[294] Given these and other recommendations, it may be asked, what need is there for authority to arrest and imprison recalcitrant debtors?

In response to this argument it may be contended that changes in the law of execution, garnishment, and equitable execution cannot deal satisfactorily with the debtor intent on frustrating his creditors; only the ultimate sanction of imprisonment, it is argued, will be successful against such debtors. Besides, since the Commission's recommendations are not yet implemented, and their effectiveness is not yet established, it may be too early to do away with postjudgment arrest and imprisonment as an enforcement remedy. Indeed, this argument was accepted by the Commission when it considered abolishing imprisonment in the family law context in its *Report on Family Law*, Part VI, *Support Obligations*.[295] In that Report, the Commission commented as follows:[296]

> In principle, we find the power of committal for maintenance debt to be objectionable and inconsistent with our view of the methods by which legal order should be restored to discordant family relations. We are confident that the methods of enforcement which we have proposed, recognized civil methods of enforcing judgment debts, will be effective. We do not have the same confidence, however, that these recommendations can be implemented overnight, or that the support services so essential to their effectiveness will be universally available on a timely basis. The existing enforcement scheme is working, as we have said, better than ever before. However, maintenance debts are not ordinary debts; default in their payment frequently causes extraordinary hardship to family dependants. We are, therefore, hesitant to

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[291] See discussion *supra*, this ch., sec. 7(a).

[292] *Supra*, note 3.

[293] For example, the Commission proposed the introduction of a continuing garnishment remedy. It recommended significant changes to the law respecting equitable execution that would have the effect of making the appointee a receiver-manager in some cases. In addition, the Commission recommended a reduction in the time that a creditor would have to wait before the sale of land seized under a writ of enforcement.

[294] See Commission Report, *supra*, note 1, Part I (1981), ch. 4.

[295] Ontario Law Reform Commission, *Report on Family Law*, Part VI, *Support Obligations* (1975).

[296] *Ibid.*, at 208-09.

recommend the immediate abolition of the existing power of committal. Without this power, and in the absence of an effective working alternative, the existing automatic enforcement program would crumble.

We recommend that the power of committal in the family court be retained only for such time as is required to implement the alternative proposals contained in this Report for the enforcement of maintenance orders and to establish their effectiveness. As an interim reform measure the provisions for committal contained in section 12 of *The Deserted Wives' and Children's Maintenance Act* should be amended to make the sanction applicable to both spouses or parents, to reduce the maximum period of imprisonment from three months to six weeks, and to restrict the power to make any committal order to cases where it has been established that the spouse or parent is able to pay, but has wilfully refused to comply with the order by applying his or her money for the support of the other spouse or children as directed by the order; and finally, that safeguards should be introduced to preclude absolutely the exercise of the committal power against any spouse or parent who has, or may have, responsibility for the care of any children.

The Commission's recommendations in this regard were not fully implemented by the *Family Law Reform Act*.[297]

A second major argument supporting abolition of the power to arrest and imprison defaulting judgment debtors, and one that is frequently cited, is the belief that, for the most part, only debtors who are in fact unable to pay are imprisoned. This justification has found favour with those who believe that imprisonment, or the threat of imprisonment, can be an effective remedy, as well as with those who have doubts as to the efficacy of this enforcement remedy. The Payne Committee concluded, for example, that those who are imprisoned are "feckless" and "inadequate".[298] Chambers, who recognized the effectiveness of jailing as an enforcement remedy, nevertheless supported its abolition because, *inter alia*, "jailing was being used inappropriately . . . to reach a class of persons for whom payment was currently beyond their control".[299] There are, on the other hand, those debtors who have the means to pay, but who refuse to pay as a matter of principle, although this kind of debtor would seem to be the exception, rather than the rule. In such a case, imprisonment, or the threat of imprisonment, may result eventually in payment of the outstanding judgment debt.

A third argument for the abolition of postjudgment arrest and imprisonment as an enforcement remedy flows from a cost-benefit analysis of the remedy. It is argued that the cost of the remedy to the community exceeds its benefits. On the cost side of the scale, one can put the cost of incarceration, the cost to the economy of non-productivity of those who are imprisoned, and the cost to the community of embittered relations between

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[297] The maximum term of imprisonment under the Act is ninety days: see *Family Law Reform Act*, *supra*, note 78, s. 29(1)(*a*). The Commission's recommendation for an absolute prohibition against the committal of "any spouse or parent who has, or may have, responsibility for the care of any children" has not been implemented.

[298] See discussion *supra*, this ch., sec. 7(a).

[299] Chambers, *supra*, note 273, at 139.

debtor and creditor, whether arising out of a commercial relationship or a marriage. In the family law context at least, there is some evidence to suggest that jailing, rather than creating a more compliant debtor, may result in a more recalcitrant debtor.[300] On the benefit side of the scale, one can put the payments received as a result of imprisonment or the threat of imprisonment, and the deterrence factor of imprisonment. However, as Chambers has pointed out, jailing as an enforcement remedy is only effective in securing payment if it is certain and sufficiently frequent to leave a mark on the relevant community.[301] Consequently, in the short run, the cost of the remedy may increase in direct relation to its effectiveness.

A further argument justifying abolition of imprisonment as an enforcement remedy is also related to the cost-benefit analysis. It may be contended that the additional safeguards that might have to be built into the remedy to ensure compliance with the *Canadian Charter of Rights and Freedoms* will increase its cost while perhaps rendering it somewhat less effective.[302] At this time, however, it is still uncertain what effect the Charter might have on the postjudgment arrest and imprisonment provisions of the *Fraudulent Debtors Arrest Act* and the *Family Law Reform Act*. Moreover, if the case were made for postjudgment arrest and imprisonment as an enforcement remedy, it might be argued that necessary safeguards could be incorporated at a reasonable cost without interfering unduly with the effectiveness of the remedy.

Turning to the arguments in support of retaining an imprisonment remedy, one argument is the lack of any practical distinction between money judgments and non-money judgments. It may be asked why wilful refusal to comply with the latter type of order should be treated as contempt, whereas *wilful refusal* to pay should not. The danger, it is suggested, is that those who do not have the ability to pay will, for one reason or another, be the persons who will be sent to jail. On the other hand, sufficient safeguards may be provided to ensure that this does not happen. And while substantive and procedural safeguards may render the remedy somewhat less effective, this result does not justify the remedy's abolition.

The strongest justification for having an imprisonment remedy is that it appears to work. This point is established by Chambers in his study concerning the enforcement of child support orders.[303] Chambers' findings are supported by the statistics gathered for the Commission by the Provincial Court (Family Division) of the County of Kent. It is also significant that provincial court (family division) judges, generally speaking, are of the view that imprisonment, or the threat of imprisonment, is an effective enforcement remedy, and the kind of ultimate sanction necessary to ensure that the support system does not break down. Although we have

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[300] See Alberta Matrimonial Support Report, *supra*, note 256, Vol. 2, at 294. While a significant percentage of those surveyed indicated that enforcement efforts might result in less, rather than more, co-operation, one wonders whether this would, in fact, be the response of those confronted with arrest and imprisonment.

[301] See discussion *supra*, this ch., sec. 9.

[302] The procedural implications of the Charter are canvassed *supra*, this ch., sec. 8.

[303] See discussion *supra*, this ch., sec. 9.

referred to other studies that indicate that, in a significant number of cases, postjudgment arrest and imprisonment will result in payment of ordinary judgment debts, we know of no study as persuasive as Chambers' respecting the efficacy of imprisonment in the context of commercial and tort judgments.

We would note that the trend in other jurisdictions would certainly seem to be in favour of abolition of imprisonment as an enforcement remedy for non-maintenance creditors. Certainly, in the majority of jurisdictions that have examined this area of the law, abolition has been recommended in the non-family law context.[304] In Canada, at the present time, imprisonment is not available as a statutory remedy for the mere non-payment of an ordinary judgment debt in some of the provinces, although it should be noted that the contempt power can be used in some cases.[305] At the same time, it should be pointed out that, in none of the jurisdictions examined, has imprisonment been abolished in the family law context. In fact, abolition of this remedy in the family law context has not been advocated in any of the jurisdictions considered, although the members of the Payne Committee were divided on the issue.[306]

While it may be persuasively argued that imprisonment should be abolished in the case of non-maintenance debtors, the circumstances of maintenance creditors may be sufficiently different that abolition of the remedy in that context may not be justifiable. Unlike commercial creditors, maintenance creditors may be characterized as involuntary creditors. Of course, not all non-maintenance creditors are voluntary; tort claimants and the taxing authorities, for example, are involuntary creditors. Yet, despite the fact that they had recommended the abolition of imprisonment as an enforcement remedy available to taxing authorities, a number of the members of the Payne Committee voted in favour of retaining imprisonment in the family law context.[307] Such a position may be justified on the ground that the moral obligation to one's spouse, or former spouse, and children is of a higher degree than one's moral obligation to pay other creditors, whether voluntary or involuntary. It perhaps may also be argued that imprisonment is necessary as a final sanction because of the fact that the societal pressures to pay are greater in the commercial context than in the family law context.

(b) Conclusions

The Commission has concluded that the arguments both for and against the remedy of postjudgment arrest and imprisonment for non-payment of a money judgment are closely balanced. Accordingly, we do not support any radical change in the availability of this remedy; in other words, we are of the view that postjudgment arrest and imprisonment ought to be retained as a remedy of last resort in the family law context,

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[304] See discussion *supra*, this ch., sec. 7(a).

[305] See discussion *supra*, this ch., sec. 4.

[306] See discussion *supra*, this ch., sec. 7(b).

[307] *Ibid.*

but that, generally speaking, it should not be available as a means of enforcing ordinary judgments, that is to say, judgments other than those for maintenance or support.

The Commission favours retention of the remedy in the family law context because all the evidence available to us suggests that postjudgment arrest and imprisonment is effective and necessary for the enforcement of maintenance and support orders.[308] While the evidence that we have referred to also suggests that the remedy may induce payment in the non-family law context, it would appear that those who are unable to pay sometimes are imprisoned.[309] We believe that the danger inherent in such a weapon – even with adequate procedural safeguards – militates against its use to enforce ordinary money judgments. Of course, similar dangers exist with respect to the use of postjudgment arrest and imprisonment in the family law context. Nonetheless, the Commission is of the opinion that the practical disparity in the coercive powers of ordinary creditors and support or maintenance creditors, and the nature of the obligation owed by maintenance debtors when compared with that of most ordinary debtors, justify running the risks inherent in even the best-designed postjudgment arrest and imprisonment remedy.

(c) Recommendations

(i) Arrest and Imprisonment in the Family Law Context

It will be recalled that arrest and imprisonment are available under sections 24, 28, and 29 of the *Family Law Reform Act*. Section 24 concerns arrest of an absconding debtor. Sections 28 and 29 empower a court to order the arrest and imprisonment of a maintenance debtor where there has been default in the payment of a maintenance order, and the debtor is unable to establish inability to pay. We deal with section 24 later in this section.

Insofar as postjudgment arrest and imprisonment under sections 28 and 29 of the *Family Law Reform Act* are concerned, the Commission believes that provincial courts (family division) should continue to enjoy these powers, subject to what is said below. However, we are also of the view that all courts from which a support or maintenance order may emanate, including the Supreme Court or a county or district court, should be empowered to enforce their own orders by means of arrest and imprisonment of the defaulting debtor in similar circumstances. Of course, support or maintenance orders made by the Supreme Court or a county or district court may be registered[310] in the provincial court (family division) and enforced by means of arrest and imprisonment in this way. We know of no reason, however, why the Supreme Court and county and district courts should not be able to enforce their own orders in a manner similar to the provincial courts (family division). Accordingly, the Commission recom-

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[308] See discussion *supra*, this ch., sec. 9.

[309] *Ibid.*

[310] See *Family Law Reform Act*, *supra*, note 78, s. 27(1).

mends that postjudgment arrest and imprisonment should be available as an ultimate sanction for the enforcement of support and maintenance orders and should be available at all court levels.

To give effect to this recommendation, section 12 of the *Fraudulent Debtors Arrest Act*[311] and Rule 569 of the Supreme Court of Ontario Rules of Practice[312] will have to be amended. We, therefore, recommend that section 12 of the *Fraudulent Debtors Arrest Act* should be amended to provide that the prohibition against "arrest for contempt for non-payment of any sum of money or of costs, charges or expenses payable by a judgment or order of the Supreme Court or of a judge thereof, or of a county court or of a judge thereof" does not apply in the case of an order for support or maintenance. We further recommend that Rule 569 of the Rules of Practice should be amended to provide that an order for maintenance or support "may be enforced by attachment".

Insofar as the nature of the postjudgment arrest and imprisonment remedy proposed by the Commission is concerned, we believe that the remedy is analogous to and should be characterized as a contempt power in the court to ensure compliance with judicial process, and we so recommend. In this way, non-compliance with a maintenance or support order and any other type of judgment or order would be treated similarly.

While it may be argued that, because of section 96 of the *Constitution Act, 1867*,[313] a provincially appointed judge cannot constitutionally be empowered to commit for contempt not in the face of the court, we do not share this view. We would note that, even at the present time, judges of the provincial courts (family division) have power to commit for contempt in respect of acts not in the face of the court.[314]

One final point should be made regarding the scope of the postjudgment arrest and imprisonment remedy that we believe should be available to enforce orders for support and maintenance. Elsewhere in our *Report on the Enforcement of Judgment Debts and Related Matters*, we have made recommendations designed to give maintenance and support creditors an advantage over ordinary judgment creditors. Where this has been done, we have proposed that the benefit should be available equally to persons enforcing a maintenance order made under the *Divorce Act*, persons

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[311] *Supra*, note 1.

[312] *Supra*, note 23.

[313] See *supra*, note 177.

[314] See the *Family Law Reform Act*, *supra*, note 78, s. 37, which provides as follows:

> 37.-(1) In addition to its powers in respect of contempt, every provincial court (family division) may punish by fine or imprisonment, or by both, any wilful contempt of or resistance to its process, rules or orders under this Act, but the fine shall not in any case exceed $1,000 nor shall the imprisonment exceed ninety days.
>
> (2) An order for imprisonment under subsection (1) may be made conditional upon default in the performance of a condition set out in the order and may provide for the imprisonment to be served intermittently.

enforcing a support order under the *Family Law Reform Act*, and persons enforcing the support provisions of a cohabitation agreement, marriage contract, separation agreement, or paternity agreement, as provided by the *Family Law Reform Act*.[315] We are of the view, and accordingly recommend, that the last-mentioned group should be able to resort to the remedy of postjudgment arrest and imprisonment wherever a person seeking to enforce a maintenance or support order could have resort to this remedy under the recommendations contained in this section. Of course, in the case of a cohabitation agreement, marriage contract, separation agreement, or paternity agreement, the creditor would have to obtain a judgment.[316]

Turning to section 24 of the *Family Law Reform Act*, it will be recalled that a maintenance debtor may be arrested following the initiation of show cause proceedings where "a judge of the court is satisfied that the . . . debtor is about to leave Ontario". Subject to the procedural safeguards proposed below, we believe that the provincial courts (family division) should continue to have such a power, and we so recommend.[317]

Under section 27(2) of the *Fraudulent Debtors Arrest Act*,[318] a Supreme Court judge or a county or district court judge is empowered to order the arrest and imprisonment of a judgment debtor where it is satisfied "that there is good and probable cause for believing that the defendant, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally or the plaintiff in particular". This power is exercisable in respect of maintenance and non-maintenance debtors alike. It should be noted, however, that the onus of proof under section 27(2) of the *Fraudulent Debtors Arrest Act* is considerably higher than that under section 24 of the *Family Law Reform Act*, discussed above. Under the latter, a creditor must show simply that the debtor is about to

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[315] See, for example, Commission Report, *supra*, note 1, Part II (1981), at 93 and 174.

[316] For a provision similar in effect to this recommendation, see *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1, s. 134, which provides in part as follows:

> 134.-(1) Any agreement that contains a provision with respect to the support of a dependant by a person upon whom an obligation to support is imposed by this Part, including the payment of an amount to the Minister in respect of assistance or financial support provided by him, and that conforms with requirements as to form that are prescribed in the regulations, may be filed with the court in the manner provided by regulation, and upon being filed has, for the purposes of enforcement, and subject to the provisions of this Part with respect to variation, the same force and effect as an order of the court made under this Part and shall be deemed to be an order made by the court.

As a result, a support creditor with the benefit of a separation agreement, for example, could resort to show cause proceedings and ultimately arrest and imprisonment of the defaulting debtor: see *ibid.*, s. 126, and *Moulton v. Moulton* (1982), 40 N.B.R. (2d) 693, 105 A.P.R. 693 (N.B.Q.B. (F.D.)).

See, also, *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 74, and *Re Taylor and A.G.B.C.* (1982), 40 B.C.L.R. 70 (S.C.).

[317] For a similar power in respect of Supreme Court and county and district judges in cases involving ordinary money judgments, see discussion *infra*, this ch., sec. 10(c)(ii).

[318] *Supra*, note 1.

leave Ontario; under the former, a creditor must also show that the debtor has the requisite intent. We can see no reason to have different tests depending upon the court in which the application for the maintenance debtor's arrest and imprisonment is made. In the case of maintenance debtors, we believe that the appropriate test is the one contained in section 24 of the *Family Law Reform Act*. Accordingly, we recommend that the Supreme Court and county and district courts should be empowered to order the arrest of a defaulting maintenance or support debtor where they are satisfied that the debtor is about to leave Ontario.

Finally, there is one other instance in which the arrest and imprisonment of a maintenance debtor should be possible, that is, where the debtor has dealt with his property to the prejudice of his creditor. The Supreme Court and county and district courts now enjoy such a power under both section 27(2) of the *Fraudulent Debtors Arrest Act* and Rule 594 of the Ontario Rules of Practice.[319] Section 27(2) of the *Fraudulent Debtors Arrest Act*, it will be remembered, provides that a judge may order a writ of *capias ad satisfaciendum* where he is satisfied that "the defendant has parted with his property or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution". Under Rule 594, a debtor may be committed for up to twelve months where it appears to a court from a judgment debtor examination that the debtor "has concealed or made away with his property in order to defeat or defraud his creditors or any of them". No similar provisions are to be found in the *Family Law Reform Act*. The Commission is of the opinion that a provision of this sort should be available to enable a maintenance creditor who learns of such actions on the part of his maintenance debtor to force him to reverse any voidable transactions or to reveal the whereabouts of property, as the case may be.

While the principle of these provisions is worthy of retention we believe that only one, uniform provision is necessary. The Commission, therefore, recommends that the Supreme Court, county and district courts, and provincial courts (family division) should be able to commit a maintenance or support debtor for contempt of court where they are satisfied that the debtor has removed his property from the Province, or has assigned, transferred, disposed of, encumbered or secreted his property with intent to defeat, defraud, hinder, or delay any of his creditors.

(ii) Arrest and Imprisonment in the Non-Family Law Context

For the reasons indicated previously in this chapter, the Commission recommends that arrest and imprisonment for simple non-payment of an ordinary money judgment should continue to be unavailable as an enforcement remedy. We would point out, however, that this recommendation does not preclude the use of arrest and imprisonment to deal with acts of a judgment debtor that are now subject to the remedy and that may be characterized more clearly as being in contempt of court.

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[319] See discussion *supra*, this ch., sec. 3.

As was pointed out in the previous section, at the present time a judgment debtor may be ordered arrested and imprisoned under section 27(2) of the *Fraudulent Debtors Arrest Act* where a court is satisfied "that there is good and probable cause for believing . . . that the defendant, unless he be forthwith apprehended, is about to quit Ontario with intent to defraud his creditors generally or the plaintiff in particular". Subject to the procedural safeguards proposed below, we see no need to alter section 27(2) in this respect. In our opinion, this provision helps to ensure that debtors do not resort to the expedient of departing the jurisdiction, thereby making enforcement of a money judgment more difficult and, in some cases, practicably impossible because of the additional time, energy, and cost that will have to be devoted to enforcing the judgment in a foreign jurisdiction or to obtaining a foreign judgment against the debtor. Accordingly, we recommend that the Supreme Court or a county or district court should be able to commit for contempt of court where it is satisfied that there is good and probable cause for believing that the debtor, unless he is apprehended forthwith, is about to depart from Ontario with intent to defeat, defraud, hinder, or delay his creditors generally or the applicant in particular. It will be noted that, unlike our earlier recommendation in the family law context, we would retain, as a requirement, proof of the debtor's intent to prejudice his creditors. In the view of the Commission, the interests of debtors and creditors are somewhat differently balanced in the non-family law context, and the intent requirement will help to ensure that the power to arrest and imprison in the circumstances under consideration will not be abused by the ordinary judgment creditor.

The other circumstance in which we believe ordinary judgment creditors should be able to resort to the remedy of postjudgment arrest and imprisonment is where the debtor has dealt with his property to the detriment of his creditors. As discussed in the previous section, the Supreme Court and county and district courts now enjoy such a power under both section 27(2) of the *Fraudulent Debtors Arrest Act* and Rule 594 of the Ontario Rules of Practice. For the reasons mentioned earlier, we believe that ordinary judgment creditors also should be able to resort to arrest and imprisonment where it can be shown that the debtor has removed his property from the Province, or has assigned, transferred, disposed of, encumbered or secreted his property with intent to defeat, defraud, hinder, or delay any of his creditors, and we so recommend.

(iii) Procedural Safeguards

Having determined the nature and scope of the courts' power to arrest and imprison a debtor for non-payment of a money judgment as well as for actions taken to frustrate the enforcement efforts of his judgment creditor, we turn to the procedural safeguards that should be put in place in order to prevent abuse of this ultimate enforcement remedy.

a. Committal for Non-Payment of a Support or Maintenance Obligation: Inability to Pay as a Defence

As was pointed out earlier, a support or maintenance debtor may be ordered to be imprisoned under section 29 of the *Family Law Reform Act* where he is in default and he "fails to satisfy the court that the default is

owing to his . . . inability to pay".[320] In our view, the defence of inability to pay should continue to be available where arrest and imprisonment is sought for simple non-payment of a support or maintenance order, and should be available whether committal proceedings are brought in the provincial court (family division), the Supreme Court of Ontario, or a county or district court. We so recommend. As the purpose of arrest and imprisonment for non-payment of a maintenance or support order is to enforce the order, and not to punish a defaulting debtor, a debtor who does not have the means to meet his support or maintenance obligations should not be subject to arrest and imprisonment. To permit a creditor to resort to this enforcement remedy in the circumstances just described would be to return to the notion of debtors' prison, a feature of the administration of justice long ago abandoned in this Province and most other common law jurisdictions.

It may be contended that requiring the debtor to establish "that the default is owing to his or her inability to pay" is an infringement or contravention of section 11(*d*) of the *Canadian Charter of Rights and Freedoms*, which provides as follows:

> 11. Any person charged with an offence has the right
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> . . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; . . .

At this stage in the life of the Charter, it is unclear, however, whether the words "[a]ny person charged with an offence" will be interpreted to include provincial criminal offences and civil arrest and imprisonment powers, whether or not characterized as contempt of court committal powers. Even assuming that section 11(*d*) of the Charter will be interpreted broadly, we are not satisfied that requiring a defaulting debtor to establish inability to pay would violate section 11(*d*). Section 29 of the *Family Law Reform Act* requires proof of a default before the debtor must establish inability to pay as a defence to the "charge". In our opinion, a provision like section 29 of the *Family Law Reform Act* is very different from the kind of provision that the Supreme Court of Canada has found to be in violation of the *Canadian Bill of Rights* equivalent to section 11(*d*) of the Charter,[321] and the kinds of provision that courts have found to be an infringement of the Charter's rights and guarantees.[322] Clearly, the defaulting debtor is in a position to prove inability to pay; indeed, he is the person best able to explain his financial circumstances.

Even if section 11(*d*) of the *Canadian Charter of Rights and Freedoms*

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[320] See, also, s. 51(1) of the *Fraudulent Debtors Arrest Act*, *supra*, note 1.

[321] See *The Queen v. Shelley*, [1981] 2 S.C.R. 196, [1981] 5 W.W.R. 481.

[322] Concerning s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, see *R. v. Anson* (1982), 1 C.R.R. 221 (B.C. Co. Ct.); *R. v. Therrein* (1982), 37 O.R. (2d) 641, 67 C.C.C. (2d) 31 (Co. Ct.); and *R. v. Stanger*, unreported (June 10, 1982, Alta. Q.B.) (not in violation of s. 11(*d*) of the Charter). Compare *R. v. Oakes*, unreported (February 2, 1983, Ont. C.A.); *R. v. Hay (No. 1)* (1982), 1 C.R.R. 232 (Ont. Dist. Ct.); *R. v. Terlecki*, unreported (July 30, 1982, Man. Prov. Ct.); and *R. v. Carroll*, unreported (July 14, 1982, P.E.I.S.C.) (s. 11(*d*) of the Charter contravened).

could be invoked in the circumstances under consideration, a provision imposing the onus of proof of inability to pay on the defaulting debtor, rather than requiring the enforcing creditor to prove ability to pay, could still be saved by section 1 of the Charter. It will be recalled that this provision enables a legislature to subject rights guaranteed by the Charter "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It may be that the special nature of the legal obligation could be called upon as a justification for requiring the debtor to establish his inability to pay as the cause of his default.

Regarding the circumstances that might justify a finding of inability to pay, it will be recalled that, under the *Family Law Reform Act*, this defence would seem to be unavailable where the debtor's difficulties are the result of voluntary unemployment.[323] It is unclear whether the defence of inability to pay would be established by evidence indicating that, although the debtor had the means to pay following the making of the maintenance or support order against him, he subsequently squandered his assets.[324] This scenario also raises the issue whether the relevant time to determine inability to pay should be the date of the hearing or at any time after the support or maintenance obligation arose.[325] Again, there is no clear authority on this point under section 29 of the *Family Law Reform Act*. There would also appear to be some question whether a debtor could rely on the inability to pay defence where he is able to borrow sufficient funds to satisfy his outstanding obligation.[326]

The Commission is of the view that, because it is impossible to foresee the myriad of different fact situations with which courts might be confronted in dealing with the question of ability or inability to pay, it would be unwise to prescribe by legislation what constitutes inability to pay. On this question, we believe that it is better to provide the courts with a broad

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[323] See discussion *supra*, this ch., sec. 5.

[324] For a discussion of this issue, see Komar, *supra*, note 88.

[325] See *ibid.*, at 540-41, where the following comment is made:

> Where a respondent has chosen to ignore the Court order when he was prosperous, does a recent reversal of fortunes now offer him a defence to a show cause hearing? In other words, is the Court interested in yesterday's inability to pay or only in today's inability? There may be a practical difficulty in gaoling a formerly prosperous person for his past sins, for it looks as if he is being imprisoned because he is poor. Yet this is a dangerous proposition to adopt, since it would effectively licence the respondent to eat, drink and be merry during periods of prosperity at the expense of his dependants and to avoid any accounting to the Court when he happens to be poor the next day. It is a defence which can be too easily contrived to coincide conveniently with the date of the show cause hearing. It is not surprising, therefore, that American Courts have tended to ignore today's poverty as an excuse for yesterday's failure to pay.

[326] *Ibid.*, at 541 (emphasis in original):

> Inability to pay does not mean a lack of *liquid* assets. If a man can reasonably be expected to borrow and has the facilities to borrow, then he has the ability to pay, even though he cannot do so without borrowing. Particularly where a respondent has property or capital assets, the onus is upon him to show that he could not reasonably be expected to borrow money with which to pay maintenance. A mere reluctance by a defaulter to put up his assets as collateral or security for a loan should not be accepted as a defence.

discretion, thereby enabling courts to take all relevant factors into account and giving courts sufficient flexibility to do justice in each individual case that comes before them.

b. Resort to Other Practicable Methods of Enforcement as a Precondition to Arrest and Imprisonment

As another safeguard against inappropriate resort to the proposed power to commit for contempt for non-payment of a maintenance or support obligation, the Commission believes that a prerequisite to such relief should be a showing that there are no other practicable enforcement remedies available to the judgment creditor. Under section 29(1) of the *Family Law Reform Act*, imprisonment of a defaulting maintenance or support debtor cannot be ordered unless the court is satisfied "that all other practicable means that are available under this Act for enforcing payment have been considered". From the few reported cases in which this aspect of section 29 has been discussed, it is unclear whether it must be shown that other methods of enforcement have been tried without success.[327] In a number of cases, courts have indicated that it is sufficient to show simply that the other methods of enforcement have been considered.[328]

Given that the Commission has made a number of recommendations in earlier Parts of the *Report on the Enforcement of Judgment Debts and Related Matters* to ensure that almost all of a debtor's property will be subject to enforcement and to make the various enforcement remedies more effective, we believe that a creditor seeking to enforce a judgment by means of arrest and imprisonment should be required to prove to the court that there are no other practicable enforcement remedies available, and we so recommend.[329] This would be a slightly higher standard than that now imposed by section 29 of the *Family Law Reform Act*. The creditor would be required to show more than simply that other methods of enforcement have been considered; he or she would be required to satisfy the court that other enforcement measures have been tried and have not succeeded in satisfying the creditor's judgment, or that other methods of enforcement would be inappropriate or futile in the circumstances of the case. The latter might be sufficient where, for example, the debtor is unemployed, has concealed his exigible assets, or where his assets are beyond the jurisdiction.

c. Early Release upon Payment

The *Family Law Reform Act* contains no provisions entitling the debtor to release from prison upon payment of the outstanding judgment, although it would appear that, in practice, a debtor who pays his outstand-

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[327] See *Mol v. Mol* (1980), 18 R.F.L. (2d) 253 (Ont. Co. Ct.).

[328] See *Mol v. Mol*, *ibid.*; *Coomber v. Coomber* (1981), 21 R.F.L. (2d) 382 (Ont. Co. Ct.); and *Re Cserzy and Cserzy* (1981), 33 O.R. (2d) 653, 23 R.F.L. (2d) 217 (Co. Ct.).

[329] There is some evidence to suggest that the courts have not made adequate use of the most important remedy available under the *Family Law Reform Act*, that is, wage attachment: see discussion *supra*, at 140.

ing arrears will be released from custody.[330] As the purpose of arrest and imprisonment for non-payment of a judgment debt is not punishment but enforcement, there would not seem to be any good reason for continuing to detain a debtor who is no longer in default. Accordingly, it is recommended that any legislation authorizing arrest and imprisonment should provide expressly that, upon payment of the amount stated in the order pursuant to which he has been arrested and imprisoned, the debtor should be released from custody. This recommendation should apply whether the debtor's imprisonment is founded on default and an ability to pay, on the fact that the debtor was about to leave Ontario, or on a finding that the debtor has dealt with his property with the intent of defeating, defrauding, hindering, or delaying his creditors.

d. Imprisonment and its Effect on the Outstanding Judgment

Although section 57 of the *Fraudulent Debtors Arrest Act*, like most legislation with a similar purpose, contains an express provision to the effect that imprisonment does not operate "as a satisfaction or extinguishment of the debt or [deprive] the creditor of the right to take out execution or other process against the property of the debtor", no similar provision is to be found in the *Family Law Reform Act*. It is recommended that any legislation authorizing arrest and imprisonment as an enforcement remedy should contain a provision similar to section 57 of the *Fraudulent Debtors Arrest Act*. Again, since the purpose of imprisonment is to effect compliance with an order for the payment of money, there is no justification for viewing imprisonment as an alternative to payment.

e. Conditional Imprisonment Orders

As has been pointed out, a court, under section 29(2) of the *Family Law Reform Act*, is authorized to make a conditional imprisonment order. That is to say, the court is authorized to order imprisonment, but to stay the order for a fixed period of time (for example, thirty days) to give the debtor an opportunity to pay the outstanding amount and thereby avoid imprisonment. In other words, the debtor is given an opportunity to purge his "contempt". No such power is to be found in the *Fraudulent Debtors Arrest Act*. There is some evidence to suggest that conditional imprisonment orders have the desired effect – that is, encouraging payment without resort to actual imprisonment – with a resultant saving to the community.[331] Given this evidence, there would seem to be every reason to give courts such a power. Accordingly, we recommend that wherever, under our recommendations, a court would have the power to imprison a debtor, it should be able to make a conditional imprisonment order.

Assuming the debtor fails to fulfil the conditions imposed by the court, should he be liable to arrest and imprisonment without a further hearing

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[330] Insofar as the *Fraudulent Debtors Arrest Act*, *supra*, note 1, is concerned, see ss. 34 and 40, which would appear to apply to prejudgment arrest and imprisonment.

[331] See the information obtained from the Provincial Court (Family Division) of the County of Kent, *supra*, this ch., sec. 9.

and an opportunity to explain his default? Although there is no requirement for a hearing in the *Family Law Reform Act*, it would appear that some courts have adopted such a procedure in fairness to the debtor. For example, it may be that, subsequent to the making of the conditional imprisonment order, the debtor has become incapacitated or unemployed and therefore is no longer able to pay. It would be unfair to imprison such a debtor, just as it would be unfair to imprison any debtor who is unable to pay the amount of the judgment outstanding. Given section 7 of the *Canadian Charter of Rights and Freedoms* and the right enshrined therein not to be deprived of the right to liberty "except in accordance with the principles of fundamental justice", it might be an infringement of this right to imprison a defaulting debtor without giving him or her an opportunity to explain the default.[332]

Accordingly, it is recommended that, where a debtor fails to fulfil the conditions imposed by a court in making a conditional imprisonment order, he should be given an opportunity to explain his default before he is ordered imprisoned. This right could be given effect to by requiring the court, when it makes a conditional imprisonment order, to adjourn the proceedings to a fixed future date.

f. Ordering Imprisonment in the Absence of the Debtor

The *Fraudulent Debtors Arrest Act* permits a judgment creditor to obtain an *ex parte* order for the imprisonment of his debtor.[333] While the *Family Law Reform Act* requires the debtor to receive notice of a show cause hearing, there is nothing to prevent the court from proceeding in the debtor's absence. The court is authorized under section 28(2) of the *Family Law Reform Act* to order a debtor who fails to appear to be arrested "for the purpose of compelling attendance". However, the court is not required to do so; it has a discretion whether to issue a warrant for the debtor's arrest.

To avoid the possibility of imprisonment of those who are unable to pay, it is recommended that imprisonment of a debtor should never be ordered in the debtor's absence. It may be, for example, that the debtor does not understand the notice he has received, or he may never have been notified of the proceedings. If the debtor fails to appear at the initial hearing, or at the continuation of the hearing where a conditional imprisonment order has been made, it is recommended that the court should issue a warrant for his arrest; the debtor, then, should be brought before the court as soon as possible so that he has the opportunity to explain his default. In this way, the debtor will not be deprived of his right to liberty and security of the person under the Charter except in accordance with the principles of fundamental justice. On such an issue, it would seem best to err on the side of caution and the above proposal, it is suggested, would do precisely that.

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[332] See the discussion *supra*, this ch., sec. 8, regarding imprisonment without the right to a hearing and the American "due process" guarantee.

[333] *Supra*, note 1, s. 27.

In the case of a debtor whose imprisonment is ordered on the ground that he is about to leave the jurisdiction or that he has dealt with his property to the prejudice of his creditors, the Commission believes that, in order to ensure compliance with the recently proclaimed *Canadian Charter of Rights and Freedoms*, the following procedure should be followed. The debtor should be required to be brought before the court as soon as possible after his arrest. At such time, the judgment creditor should again be required to establish the grounds for arrest and imprisonment. Failure to satisfy the court that the debtor has been guilty of the conduct alleged should result in the debtor's immediate release. We so recommend.

g. Term of Imprisonment

The final issue concerning postjudgment arrest and imprisonment that needs to be addressed in this Report is the maximum term of imprisonment that may be imposed under the Commission's various proposals. Insofar as the present law is concerned, the maximum term for which a debtor may be committed varies from two months, subject to extension, to twelve months, depending upon the grounds for the order of imprisonment. Section 27(2) of the *Fraudulent Debtors Arrest Act* empowers a court to order the arrest and imprisonment of an "absconding" debtor as well as a debtor who has dealt with his property to the prejudice of his creditors. Section 27(3) of the Act provides that every writ of *capias ad satisfaciendum* issued in the circumstances described above "continues in force for two months from the day of its issue and no longer, but on its expiration another writ may be obtained". As was pointed out earlier, the Rules of Practice authorize imprisonment of a debtor who "has concealed or made away with his property in order to defeat or defraud his creditors or any of them" "for a term of not more than twelve months".[334] The absconding debtor provision of the *Family Law Reform Act* – section 24 – contains no limitation respecting the period of confinement that may be ordered thereunder. Finally, the "show cause" procedure contained in the *Family Law Reform Act* prescribes a term of imprisonment of "not more than ninety days to be served intermittently or as ordered by the court".[335]

The Commission, it will be recalled, has recommended that the power of the court to imprison a debtor for failing to pay a support or maintenance obligation when he has the ability to pay, preparing to abscond from the jurisdiction, or dealing with his property to the prejudice of his creditors should be characterized as a contempt power. The purpose of imprisonment under our recommendations is solely to encourage compliance with the orders and judgments of the courts. Imprisonment of defaulting judgment debtors is not intended to be used as punishment for nefarious conduct; the criminal law is available for this purpose. Consequently, we can see no justification for variations, based on the grounds for imprisonment, in the maximum term for which a judgment debtor may be imprisoned. In our view, the maximum term prescribed by section 29 of the

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[334] Rules of Practice, *supra*, note 23, r. 594.

[335] *Supra*, note 78, s. 29(1).

Family Law Reform Act – ninety days – is not inappropriate, and has the virtue of being a recent indication of an acceptable legal response to the matters under consideration in this chapter. By contrast, the two month maximum, subject to extension, under the *Fraudulent Debtors Arrest Act*, and the twelve month period of incarceration permitted by Rule 594 of the Rules of Practice are standards that were thought to be acceptable almost a century ago. Accordingly, the Commission recommends that, where postjudgment arrest and imprisonment may be used as an enforcement remedy under the Commission's recommendations in this chapter, the maximum term of imprisonment that may be imposed should be ninety days.

Recommendations

The Commission makes the following recommendations:

1. (1) Postjudgment arrest and imprisonment should be available as an ultimate sanction for the enforcement of support and maintenance orders and should be available at all court levels.

   (2) Accordingly, section 12 of the *Fraudulent Debtors Arrest Act* should be amended to provide that the prohibition against "arrest for contempt for non-payment of any sum of money or of costs, charges or expenses payable by a judgment or order of the Supreme Court or of a judge thereof, or of a county court or of a judge thereof" does not apply in the case of an order for support or maintenance. Similarly, Rule 569 of the Supreme Court of Ontario Rules of Practice should be amended to provide that an order for maintenance or support "may be enforced by attachment".

2. The remedy of postjudgment arrest and imprisonment should be characterized as a contempt power in the court to ensure compliance with judicial process.

3. (1) The provincial courts (family division) should continue to be able to order the arrest of a defaulting maintenance or support debtor where notice of show cause proceedings has been issued and the judge of the court is satisfied that the debtor is about to leave Ontario.

   (2) The Supreme Court and county and district courts should also be empowered to order the arrest of a defaulting maintenance or support debtor where they are satisfied that the debtor is about to leave Ontario.

4. The Supreme Court, county and district courts, and provincial courts (family division) should be able to commit a maintenance or support debtor for contempt of court where they are satisfied that he has removed his property from the Province, or has assigned, transferred, disposed of, encumbered or secreted his property with intent to defeat, defraud, hinder, or delay any of his creditors.

5. Recommendations 1, 3, and 4 should apply where there is a default in the performance of the support or maintenance obligations of a cohabitation agreement, marriage contract, separation agreement, or paternity agreement, as defined by the *Family Law Reform Act*.

6. Arrest and imprisonment for simple non-payment of an ordinary money judgment should continue to be unavailable as an enforcement remedy.

7. The Supreme Court and county and district courts should be able to commit an ordinary judgment debtor for contempt of court where they are satisfied that there is good and probable cause for believing that the debtor, unless he is apprehended forthwith, is about to depart from Ontario with intent to defeat, defraud, hinder, or delay his creditors generally or the applicant in particular.

8. The Supreme Court and county and district courts should be able to commit an ordinary judgment debtor for contempt of court where they are satisfied that the debtor has removed his property from the Province, or has assigned, transferred, disposed of, encumbered or secreted his property with intent to defeat, defraud, hinder, or delay any of his creditors.

9. The defence of inability to pay should continue to be available where arrest and imprisonment is sought for simple non-payment of a maintenance or support order, and should be available whether committal proceedings are brought in the provincial court (family division), the Supreme Court, or a county or district court.

10. A creditor seeking to enforce a maintenance or support obligation by means of arrest and imprisonment should be required to prove that there are no other practicable enforcement remedies available.

11. Any legislation authorizing arrest and imprisonment should provide expressly that, upon payment of the amount stated in the order pursuant to which he has been arrested and imprisoned, the debtor should be released from custody.

12. Any legislation authorizing arrest and imprisonment should contain a provision similar to section 57 of the *Fraudulent Debtors Arrest Act*, stating that imprisonment does not operate as a satisfaction or extinguishment of the debt or deprive the creditor of the right to enforce his judgment against the property of the debtor.

13. Wherever, under our recommendations, a court would have the power to imprison a debtor, it should be able to make a conditional imprisonment order.

14. Where a debtor fails to fulfil the conditions imposed by a court in making a conditional imprisonment order, he should be given an opportunity to explain his default before he is ordered imprisoned.

15. Imprisonment of a debtor should never be ordered in the debtor's absence. If, upon default in payment of a maintenance or support order, the debtor fails to appear at the initial hearing or at the continuation of a hearing where a conditional imprisonment order has been made, the court should issue a warrant for the debtor's arrest; the debtor, then, should be brought before the court as soon as possible so that he has an opportunity to explain his default.

16. Where a debtor is ordered imprisoned on the ground that he is about to leave the jurisdiction or that he has dealt with his property to the prejudice of his creditors, he should be required to be brought before the court as soon as possible after his arrest. At such time, the judgment creditor should again be required to establish the grounds for arrest and imprisonment. Failure to satisfy the court that the debtor has been guilty of the conduct alleged should result in the debtor's immediate release.

17. Where postjudgment arrest and imprisonment may be used as an enforcement remedy, the maximum term of imprisonment that may be imposed should be ninety days.

CHAPTER 4

THE LIABILITY OF SHERIFFS, CREDITORS, AND SOLICITORS IN THE ENFORCEMENT OF JUDGMENT DEBTS

1. INTRODUCTION

In the first three Parts of its *Report on the Enforcement of Judgment Debts and Related Matters*, the Commission emphasized that the "haphazard and uncertain" nature of enforcement law necessarily requires that the present enforcement regime undergo "reorganization, rationalization and reform".[1] As it now stands, "the law often has left . . . enforcement personnel in some confusion concerning the administration of the enforcement system as a whole . . .".[2] Not surprisingly, this confusion, in turn, has bred caution on the part of sheriffs in the exercise of their statutory and common law enforcement duties – a caution that, at times, has been somewhat excessive and, therefore, potentially prejudicial to the interests of all parties and to the sound administration of justice.[3]

In light of the manifold deficiencies in the present law, the Commission has attempted, in this Report, to rationalize that body of law dealing with the enforcement of judgment debts. A number of our proposals for reform relate directly or indirectly to the administrative role of the sheriff and the nature and scope of his enforcement duties, as well as his potential liability for acts or omissions in the course of those duties. For example, as we shall consider in more detail below, recommendations were made respecting the seizure and sale of property in the possession of the debtor.[4] These recommendations, we believe, would bring considerably more certainty to the role and obligations of the sheriff and thereby serve to minimize the potential for behaviour on the sheriff's part that would be prejudicial to interested parties and that might result in his liability.

However, while the Commission's previous proposals – certainly those dealing expressly with the role of the sheriff – generally would go some

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[1] Ontario Law Reform Commission, *Report on the Enforcement of Judgment Debts and Related Matters*, Parts I, II, and III (1981) (hereinafter referred to as "Commission Report"), Part I, at 5.

[2] *Ibid.*, at 77.

[3] See, for example, *ibid.*, Part II, at 32.

[4] See *infra*, this ch., sec. 6(b)(i).

distance in reducing the vagaries surrounding the sheriff's duties and liability, they were not intended to be comprehensive. Consequently, we deferred to this chapter a consideration of certain significant aspects of the sheriff's liability not hitherto dealt with in our Report.

Moreover, we have left to this chapter a discussion of a separate, but related, topic. Not only might an aggrieved debtor, creditor, or third party feel disposed to sue the sheriff for an alleged wrong committed in the course of enforcing a money judgment, but a debtor or, for example, a true owner of property that allegedly has been wrongfully seized might wish to institute an action against the creditor or his solicitor for an excessive or wrongful seizure, particularly where the sheriff had been acting pursuant to explicit directions from the creditor or the solicitor. The liability of enforcement creditors and their solicitors also falls to be considered in this chapter.

At the outset, two points should be noted. First, despite the existence of thousands of issued writs of execution, there is a paucity of modern jurisprudence on the subject of sheriff's liability, and even less on the liability of creditors and their solicitors. What little case law there is arose, in the main, in the nineteenth and early twentieth centuries. And, except for some recent sporadic references,[5] commentary on the subject of sheriff's liability may be found only in early texts.[6]

Secondly, it should be emphasized that, relative to the very large number of writs in force in Ontario at any one time, the incidence of claims against sheriffs is exceedingly low. In part, the general absence of complaints is a manifestation of the ability of sheriffs and parties to resolve differences by means of negotiation and compromise. But this *modus vivendi* is also a reflection of the relatively restrictive provisions of the *Public Authorities Protection Act*,[7] particularly prior to 1976. We now turn to consider the relevant portions of that statute.

2. LIMITATION PERIODS RESPECTING THE LIABILITY OF THE SHERIFF

Sections 11 and 16 of the *Public Authorities Protection Act* provide for limitation periods respecting, *inter alia*, actions against the sheriff. These provisions read as follows:[8]

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[5] See, for example, Dunlop, *Creditor-Debtor Law in Canada* (1981), at 379 *et seq.*

[6] See, for example, Anderson, *A Treatise on the Law of Execution in the High Court and Inferior Courts* (1889); Edwards, *The Law of Execution Upon Judgments and Orders of the High Court* (1888); Bingham, *The Law and Practice of Judgments and Executions* (1815); and Herman, *A Treatise on the Law of Executions* (1876).

[7] *Public Authorities Protection Act*, R.S.O. 1980, c. 406.

[8] Section 11(2) of the present *Public Authorities Protection Act*, *ibid.*, was added by *The Public Authorities Protection Amendment Act, 1976*, S.O. 1976, c. 19, s. 1(2). In addition, by s. 1(1) of the latter Act, the words "cause of action arose", contained in s. 11(1), were substituted for "act, neglect or default complained of".

> 11.-(1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.
>
> (2) Subsection (1) does not apply to an action, prosecution or proceeding against,
>
> (*a*) a sheriff for an act, neglect or default in certifying as to a writ of execution that binds land; or
>
> (*b*) a land registrar for an act, neglect or default in connection with his duties under the *Registry Act* and the *Land Titles Act*.
>
> 16. A sheriff or his officer acting under a writ of execution or other process shall be deemed to be a person acting in the discharge of a public duty or authority within the meaning of this Act.

It bears emphasizing that, aside from the exception in section 11(2)(*a*), the limitation period dealing with sheriffs is relatively short and, therefore, places a heavy burden on an aggrieved person to bring his action on time.[9] Moreover, the protection afforded to sheriffs is absolute; it applies, for example, irrespective of whether they have acted "reasonably and properly in the performance of their public duties".[10]

In its 1969 *Report on Limitation of Actions*,[11] the Commission dealt, *inter alia*, with several separate limitation periods that generally "were intended to cut down the time for bringing negligence actions and were enacted to protect the interests of some special group . . .".[12] One such limitation period was section 11 of the then existing *Public Authorities Protection Act*,[13] which did not include what is now subsection (2).[14]

The Commission recommended the repeal of section 11,[15] a move sim-

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[9] Perhaps it may be argued that even s. 11(2)(*a*) is not of universal applicability with respect to the sheriff's duty to certify writs; that is, the provision may not apply where a person seeks information concerning writs that might bind personal property alone. The section certainly benefits persons involved in the conveyancing of land; indeed, the language of the provision – more particularly, the reference to the binding of "land" – makes it appear that this was the primary motivation for its enactment. But, in view of this explicit language, is s. 11(2)(*a*) applicable where the requisitioner is not interested in the sheriff "certifying as to a writ of execution that binds land", but is interested only in writs that bind personal property? However, to avoid any anomaly respecting limitation periods, a court would likely lean in favour of a broader interpretation of the provision to include the certification of writs binding either land or personalty, or both.

[10] *Barry v. Rae*, [1934] 1 W.W.R. 74 (Alta. S.C., T.D.), at 77.

[11] Ontario Law Reform Commission, *Report on Limitation of Actions* (1969).

[12] *Ibid.*, at 75.

[13] R.S.O. 1960, c. 318.

[14] See *supra*, note 8.

[15] *Report on Limitation of Actions*, *supra*, note 11, at 75, 78, and 171-72.

ilar to one made earlier in England.[16] The Commission stated that "[t]he most significant element in settling upon the time for making a claim must be the nature of the injury: it cannot be the nature of the person who is liable".[17] This recommendation was subsequently endorsed in a Discussion Paper containing a draft *Limitations Act* published by the Ontario Ministry of the Attorney General.[18]

The Commission sees no reason to depart from its earlier views respecting section 11 of the *Public Authorities Protection Act*. Consistent with our general predisposition that the Crown and its agencies should be bound in the same way as a private citizen, we remain of the view that persons exercising public duties ordinarily ought not to be granted special protection in respect of wrongs committed by them. Accordingly, we wish to reaffirm our earlier proposal that section 11 be repealed. If this proposal were implemented, the time for instituting an action against the sheriff would be no different than the time for instituting an action against any other person.

Having, then, disposed of the more general matter concerning the limitation period in respect of actions against the sheriff, we turn to consider specific issues of liability in the enforcement of judgment debts.

3. SEARCHES FOR WRITS OF EXECUTION: PRESENT LAW AND PROPOSALS FOR REFORM

(a) Searches on Behalf of Purchasers and Mortgagees of Land, Credit Grantors, and Other Persons

As indicated in Part I of this Report, the information kept by the sheriff's office concerning existing writs of execution and the status of enforcement proceedings is of interest and importance to many persons and for various reasons.[19] For example, persons agreeing to purchase land or to accept land as security for the giving of credit will conduct a search of outstanding writs against the prospective vendor or mortgagor.[20] With respect to land registered under the *Registry Act*,[21] a search must be conducted by the purchaser or mortgagee for writs filed in the appropriate sheriff's office; with respect to land registered under the *Land Titles Act*,[22] the search for writs filed with, and entered into the proper register by, the appropriate land registrar will be conducted by an official at the land titles office.

In Part III of this Report, the Commission discussed the effect of

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[16] *Ibid.*, at 78. See *Law Reform (Limitation of Actions, &c. Act), 1954*, 2 & 3 Eliz. 2, c. 36 (U.K.).

[17] *Report on Limitation of Actions*, *supra*, note 11, at 78.

[18] Province of Ontario, Ministry of the Attorney General, *Discussion Paper on Proposed Limitations Act* (September, 1977), draft *Limitations Act*, s. 18(2)13.

[19] See Commission Report, *supra*, note 1, Part I, at 145 *et seq.*

[20] See *ibid.*, Part III, at 78 *et seq.*, esp. 79-90.

[21] R.S.O. 1980, c. 445.

[22] R.S.O. 1980, c. 230, s. 137.

existing arrangements respecting searches for writs on persons in charge of maintaining the enforcement registers – that is, sheriffs and land registrars.[23] With respect to sheriffs, the Commission stated as follows:[24]

> The sheriffs must maintain comprehensive facilities for the receipt, indexing and storage of writs of execution. These facilities are operated manually and account for much of the delay in the sheriffs' offices; this manual system also increases the risk of error and consequently the exposure to civil liability of the sheriffs and ultimately the Crown.

Also in Part III of this Report, the Commission made several "short term" recommendations designed to assist persons, including sheriffs, involved in the conveyancing of land.[25] Most of the proposals were designed to ease what we have called the "similar name" problem for sheriffs – that is, the problem confronting the sheriff's staff in making "judgments about the degree of similarity between the names on . . . writs and the names of persons in respect of whom execution certificates are sought".[26] For example, the Commission recommended that "the sheriff should be required to report the existence of a writ only where the surname and at least one full given name on the writ are identical with the surname and one full given name on the request form delivered to the sheriff . . .".[27]

It was also recommended that "purchasers and mortgagees should be required to register with their deeds and mortgages a sheriff's certificate requested by and provided to them when they undertook their search for writs of enforcement".[28] The representations made in a registered sheriff's certificate could be relied upon by "the person to whom the certificate is actually issued" and "any person seeking to acquire any right, title or interest in the land subsequent to the registration of the certificate".[29] As a result of these proposals, "such persons would take free and clear of a writ of enforcement filed against an owner of land whose name appears on a registered sheriff's certificate (1) where the surname and at least one given name in full that appears on the certificate is identical to the surname and at least one given name in full that appears on the title documents of the land in question, and (2) where the sheriff does not note on the certificate the existence of any writs filed against the owner".[30]

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[23] Commission Report, *supra*, note 1, Part III, at 92-94.

[24] *Ibid.*, at 93.

[25] *Ibid.*, at 114 *et seq.* The Commission's "long term" proposals for reform are found *ibid.*, at 95-114.

[26] *Ibid.*, at 93. See, also, *ibid.*, at 83-87. The sheriff must determine whether a clear certificate should be given in respect of, for example, David P. Smith, where the sheriff has on file an execution against Paul David Smith or P. David Smith. As the Commission noted, "[o]n such judgments will depend the liability of sheriffs for prejudicing creditors by failing to discover particular executions": *ibid.*, at 93.

[27] *Ibid.*, at 139, Recommendation 21(9), in part.

[28] *Ibid.*, at 140, Recommendation 21(12).

[29] *Ibid.*, Recommendation 21(13).

[30] *Ibid.*, at 130.

Having regard to the protection given to purchasers of land under the foregoing recommendation, the Commission also proposed the creation of a new assurance fund to protect creditors. The recommendations were as follows:[31]

> [A] new assurance fund should be established and this fund,
>
> (a) should protect a creditor wrongfully deprived of his rights under a valid writ of enforcement because of the actions of a sheriff in erroneously providing a clear certificate notwithstanding the existence of a writ affecting the land in question,
>
> (b) should be established and maintained by a levy added to the cost of lodging writs of enforcement with the sheriff, and
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> (c) should provide compensation to a creditor in all cases, regardless of whether the land is registered under *The Registry Act* or *The Land Titles Act* . . . .[32]

Clearly, then, the Commission's proposals respecting writs required to be reported by a sheriff would serve to reduce significantly, if not eliminate, actions by aggrieved persons against sheriffs in respect of execution searches. Moreover, the proposed fund, like The Land Titles Assurance Fund today,[33] would also deflect liability from sheriffs for the provision of erroneous certificates.

With respect to developments subsequent to the publication of Part III of our Report, reference should be made to the new *Guideline re Execution Searches Under the Sheriffs Act, s. 11*, effective May 1, 1982. This directive may serve to alleviate the "similar name" problem, to which reference has already been made. The new rules – which, at least with respect to individuals, largely reflect the Commission's proposal concerning the reporting of writs, as described above – are as follows:[34]

> 1. *Searches for corporate or partnership names*
>
> Only executions filed against corporations or partnerships with identical names to those against which searches are requisitioned will be reported. A clear certificate issued with respect to a corporation or partnership will indicate that there are no executions filed against a corporation or partnership with that *exact* name. The sole exception to this rule will be that such searches will include searches against the name plus corporate identifiers used (Limited, Incorporated, Corporation) and as well against the name plus the abbreviation of the particular corporate identifier used.
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> . . . .

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31 *Ibid.*, at 141, Recommendation 21(16).

32 See discussion *ibid.*, at 131-32.

33 *Land Titles Act*, *supra*, note 22, ss. 60 *et seq.* See Commission Report, *supra*, note 1, Part III, at 87-90 and 94.

34 Emphasis in original.

2. *Names of individuals*

> When a search is requested against the name of an individual, only writs of execution filed against judgment debtors with an identical surname and at least one identical given name to the name against which the search was requested will be reported. . . .

Under these rules, for example, it would be clear to sheriffs that, where a search is conducted against John A. Smith, they should report executions against Frank John Smith, John Frank Smith, and A. John Smith, but exclude executions against Jack A. Smith, Johan Smith, J. Andrew Smith, and Johnny A. Smith. Whatever one's views are of this result – and it has come under some criticism for the large number of irrelevant executions reported – it does provide a substantial measure of certainty not hitherto afforded to sheriffs.

However, we are of the view that two further proposals need to be made respecting the position of the sheriff. First, to place the issue beyond all doubt, we recommend that, where the sheriff complies with the new rules respecting the reporting of writs on file at the enforcement office, he should be protected from liability. Therefore, the sheriff would continue to bear responsibility for negligent conduct where he does not comply with such rules. In respect of the remedy available to creditors aggrieved by the actions of a sheriff in erroneously providing information concerning writs of enforcement binding land, we again wish to draw attention to our proposals in Part III of this Report respecting the creation of an assurance fund to compensate such creditors. To avoid what we believe to be an unwarranted resort to the courts where the sheriff has not complied with the Commission's proposed new rules respecting the reporting of writs, we recommend further that a creditor aggrieved by the sheriff's actions should be required to look only to the new assurance fund if he seeks compensation. He should have no cause of action against the sheriff.

In addition to the use of registers of writs in the context of the conveyancing of land, such registers provide a source of information to potential credit grantors. Accurate information concerning outstanding writs against prospective credit recipients provides a means of assessing the creditworthiness of such persons.[35] For this and other reasons,[36] the Commission recommended in Part I of this Report that "each sheriff should be responsible for the establishment and maintenance in each county enforcement office of a comprehensive register of enforcement activities taken against debtors within the county".[37] Moreover, it was proposed that, if and when feasible, a province-wide enforcement register should be created.[38]

It should be clear, then, that under the proposed new regime a premium would be placed on the maintenance of a reliable register of writs and enforcement activities and on the provision of accurate information by the sheriff to persons making inquiries concerning matters recorded in the register.[39] This expanded responsibility would inevitably generate some

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[35] See, generally, Commission Report, *supra*, note 1, Part I, at 145 *et seq.*, esp. 147-49.

[36] See *ibid.*, ch. 3, esp. at 123 *et seq.*

[37] *Ibid.*, at 149.

[38] *Ibid.*

[39] Concerning the contents of the proposed register, see *ibid.*, at 150-51.

complaints or civil actions against the sheriff for negligent failure to record or provide certain information. In light of this, the Commission wishes to make several recommendations in addition to those made earlier in the context of the conveyancing of land. Before doing so, however, we wish to emphasize that our previous recommendation protecting the sheriff from liability where he has complied with the new rules respecting the reporting of writs is intended to apply not only in the context of the conveyancing of land, but also in any other context where inquiries are directed to the sheriff concerning writs lodged with him.

Turning to further recommendations for reform, we recommend, first, that the class of claims that may be compensated by means of the proposed new assurance fund should include not only claims by a creditor wrongfully deprived of his rights by the actions of the sheriff in erroneously providing a clear certificate notwithstanding the existence of the creditor's valid writ,[40] but also claims for compensation by any other person prejudiced because of the provision of an erroneous sheriff's certificate. We believe that the right to compensation from the assurance fund in the latter context ultimately rests on the same foundation as the creditor's right to look to the fund. The wrongful activity is essentially the same in both situations. We emphasize again the duty of the sheriff to establish and maintain an efficient enforcement register and the existence of the new guidelines, reproduced above, concerning what names must be reported on a search for subsisting writs. As indicated, these guidelines virtually eliminate the element of discretion and judgment that has hitherto plagued the staff in sheriffs' offices.

Our second recommendation concerns the avenue or avenues open to a person prejudiced by the sheriff's wrongful behaviour in providing an erroneous certificate. In this connection, we recommend – as we did in the case of an aggrieved creditor – that the person prejudiced should be required to look only to the assurance fund if he seeks compensation.

Finally, in addition to the levy recommended to be added to the cost of lodging writs of enforcement with the sheriff for the purpose of establishing and maintaining the assurance fund,[41] a levy should be required to be paid by all persons requesting from the sheriff information concerning writs of enforcement lodged in the enforcement office. We believe that the existence and solvency of the assurance fund is or ought to be a concern to all users of the sheriff's enforcement register.

(b) Searches for the Purpose of Distributions under Creditors' Relief Legislation

As we have seen earlier in this Part of our Report, subsequent to the completion of active enforcement proceedings, it is, and under our proposed new creditors' relief regime would continue to be, the duty of the sheriff to ascertain those creditors entitled to share in a distribution of the

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[40] See Commission Report, *supra*, note 1, Part III, at 141, Recommendation 21(16)(a).

[41] See *ibid.*, Recommendation 21(16)(b).

proceeds of enforcement.[42] Infrequently, the sheriff fails to include a creditor in the distribution list, so that the creditor is not paid the share to which he is entitled and the other creditors are, accordingly, overpaid. A question, therefore, arises concerning the remedy available to the creditor thus prejudiced. Is he restricted to an action against the sheriff? Can he seek and obtain an order setting aside the distribution or requiring the other creditors to return their portion of the windfall? Or must the aggrieved creditor await a subsequent distribution of enforcement proceeds, if any, in order to satisfy his claim? Does the sheriff have jurisdiction to rectify the initial error upon any subsequent distribution?

There is, unfortunately, a dearth of cases dealing with an overpayment to creditors. In the British Columbia case of *North Arm Transportation v. Derrick Lake Contractors Ltd.*,[43] the sheriff, knowing that a distribution was imminent, failed to inform the solicitor for a creditor of this pending development, although he had an opportunity to do so during a telephone conversation. The sheriff then distributed the proceeds of an execution, leaving out the abovementioned creditor. Hutcheon J., after noting the statutory scheme for contesting a proposed distribution, refused to set aside the distribution. During the course of an extremely brief judgment, he stated that, "[w]hatever the liability of the sheriff to the applicant, the proceedings taken by the two creditors have been proper and I cannot compel them to return the moneys paid to them".[44]

In the Alberta case of *Giguere v. Pilon*,[45] the sheriff, acting as the court-appointed receiver, overpaid a certain creditor in a distribution under a receivership. The court, in making the initial receivership order, had required the money to be distributed "to the subsisting writ holders on a pro-rated basis".

The debtor in respect of whose estate the receiver was appointed was stated in the order to be "Arthur A. Pilon". While the creditor who received the overpayment had issued his writ against "Arthur A. Pilon", two other writs, including one issued by the plaintiff, had named "Arthur Pilon" as the judgment debtor. All writs were, however, against one and the same person. Analogizing to what he believed to be the law under the *Execution Creditors Act*[46] – which did not apply here because the money was not received by the sheriff "in respect of an execution" – D.C. McDonald J. held that a creditor was entitled to be included in the receiver's distribution if his writ identified the debtor with reasonable accuracy, as was done in the case at bar.[47]

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[42] See, generally, *supra*, ch. 2.

[43] *North Arm Transportation v. Derrick Lake Contractors Ltd.* (1979), 14 B.C.L.R. 399 (S.C.).

[44] *Ibid.*, at 400.

[45] *Giguere v. Pilon* (1976), 66 D.L.R. (3d) 693 (Alta. S.C., T.D.).

[46] R.S.A. 1970, c. 128. See, now, R.S.A. 1980, c. E-14.

[47] For D.C. McDonald J.'s comments on the difficult task of the sheriff in determining whether a writ reasonably identifies the debtor – the "similar name" problem to which reference was made in the immediately preceding section – see *supra*, note 45, at 700 *et seq.*

In addition to the $1,500 distributed solely to one creditor, a further sum of $1,100 was subsequently realized by the receiver. With respect to the $1,500, D.C. McDonald J. held that, if the money "had been received in respect of an execution" – an important point of distinction from the facts in *Giguere* – the sheriff would have had to prepare a distribution list showing all three writs. He then continued as follows, by way of *obiter dicta*, respecting the rights of an execution creditor prejudiced by an erroneous distribution under creditors' relief legislation:[48]

> However, if he [the sheriff] did not do so, no claim known to law thus arises against the judgment creditor Taskey, who received the entire $1,500. He would be entitled to retain the money.
>
> Nor could the Court exercise some sort of equitable jurisdiction to correct the situation as amongst the three execution creditors when further money is received in respect of the same execution or any of the three executions.

It is critical to note that the above comments were made in respect of money that represented the proceeds of an "execution". However, in *Giguere v. Pilon*, the Court was not precluded from exercising "some sort of equitable jurisdiction to correct the situation" upon receipt of further money under the receivership. Where a court was exercising its equitable power to appoint a receiver, it could "correct the situation" by means of its "equitable discretion".[49] Accordingly, D.C. McDonald J. ordered that "the Sheriff is to distribute the $1,100 in such a manner that the ultimate result will be as if the sum of $1,500 previously distributed had been distributed among" the three judgment creditors.[50] However, he cautioned that "[t]he latter condition would not necessarily follow in every case in which a problem like this arises".[51] It was, after all, an "equitable discretion" that was being invoked and exercised.

The Commission has considered carefully the alternatives described in the preceding paragraphs – namely, setting aside a distribution, requiring repayment, or awaiting a subsequent distribution to correct an overpayment. We have also considered the alternative of giving the court a general power to make whatever order seems just and reasonable under the circumstances, including any one of the above options.

While the last-mentioned alternative appears, at least at first blush, to be a sound resolution of the problem, in some instances it might not be just or reasonable – although not impossible – to force the overpaid creditors to disgorge a portion of the proceeds, and it might be futile to expect a subsequent realization of proceeds in the near future. In such a case, the court might well find no satisfactory resolution to the problem faced by the aggrieved creditor.

Accordingly, the Commission wishes to recommend the adoption of

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[48] *Ibid.*, at 702.

[49] *Ibid.*, at 703.

[50] *Ibid.*

[51] *Ibid.*

another alternative. As we indicated in the preceding section, the Commission has already proposed the creation of a new assurance fund to protect creditors and others prejudiced by the actions of the sheriff in erroneously providing a clear certificate. We are of the view that the activity giving rise to culpability in the latter type of situation – that is to say, the sheriff's failure to discover and report a subsisting and registered writ – is essentially the same as the activity giving rise to culpability in the context of a distribution of proceeds under creditors' relief legislation. Consequently, we have decided to expand resort to the assurance fund, at least in some circumstances, where the sheriff's error has involved an overpayment. We recommend that, where the sheriff fails to include a creditor in a distribution of the proceeds of an enforcement measure, so that the creditor is not paid the share to which he is entitled under the proposed new creditors' relief legislation and the other creditors are therefore overpaid, the court, on application of the creditor, should be empowered to make whatever order seems just and reasonable under the circumstances, including setting aside the distribution, requiring repayment, awaiting a subsequent distribution to correct the overpayment, or entitling the creditor to compensation from the proposed new assurance fund.

Having regard to the options that would be open to the court to correct the sheriff's error, we see no reason why an aggrieved creditor should have a cause of action against the sheriff himself. Accordingly, we recommend that, under the circumstances described above, the sheriff should not be liable for his failure to pay the creditor his share of the proceeds.

4. LIABILITY OF THE SHERIFF FOR SEIZURE AND SALE OF PROPERTY: PRESENT LAW

(a) General

The legal and practical position of the sheriff in Anglo-Canadian jurisdictions is a difficult one. Although he acts on behalf of judgment creditors who file writs of execution with him, he has, at the same time, duties to judgment debtors against whom such writs are directed and, as a public functionary, to the court. The sheriff's duties under a writ have been said to be threefold: (1) to the judgment creditor, to obey the writ and any lawful instructions that have been given him;[52] (2) to the judgment debtor, not to do any act not authorized by the writ; and (3) to the court, to make a "return" to the writ, if required to do so.[53]

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[52] See *In re Crook* (1894), 63 L.J.Q.B. 756. With respect to the sheriff's liability for failure to withdraw pursuant to the creditor's instructions, see *Walker v. Hunter* (1845), 2 C.B. 324 (C.P.). See, also, Turriff, "A Colloquy About Sheriffs and *Nulla Bona* Returns" (1980), 38 The Advocate 23.

As to actions by the sheriff in respect of allegedly false information provided by creditors or their solicitors, see, for example, *Jarvis v. The Commercial Bank* (1842), 6 O.S. 337 (Q.B.), the facts of which are described *infra*, note 132, and *Moodie v. Dougall* (1862), 12 U.C.C.P. 555. See, also, Graham-Green, *Cordery's Law relating to Solicitors* (7th ed., 1981), at 110-11 and 112.

[53] See *Halsbury's Laws of England* (4th ed., 1976), Vol. 17, para. 429, at 256 (footnote references omitted). Form 115 under the Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540 (hereinafter referred to as "Rules of Practice"), which is the

In *McDonald v. Cameron*,[54] Mowat V.C., citing *Bethune v. Corbett*,[55] stated as follows:

> It is to be borne in mind that the Sheriff is not the agent of an execution creditor any more than of the execution debtor. His office is to execute the writ in a manner most for the advantage of both parties. He is bound to act, so far as it lies within his authority, as a provident owner would in disposing of his own property, and is to make all reasonable inquiries beforehand as to what property the debtor has, and what estate or interest in it he possesses.

Thus, it is clear that the sheriff's duty is not simply to follow the creditor's instructions, but also to take into account the position of others, in particular, the debtor.

However, it must be borne in mind that, despite the apparently divided loyalties of the sheriff, the writ of execution is in the form of a royal command to the sheriff. Form 115 under the Supreme Court of Ontario Rules of Practice[56] opens with the following seemingly unambiguous direction to the sheriff: "We command you that of the goods and chattels and lands and tenements in your bailiwick of *C.D.* you cause to be made the sum of $____ . . .". On its face, this directive appears to be mandatory, ostensibly leaving the sheriff with no discretion whenever a writ is delivered to his office.

Yet, notwithstanding the strict language of the writ, as we have already noted in Part I of this Report, "[i]n practice, at the present time, the mere delivery of a writ of *fieri facias* does not constitute a sufficient request to enforce the judgment by seizure and sale; rather, the sheriff ordinarily will await explicit instructions and information from the creditor or his solicitor".[57] In addition, "the sheriff usually will require from the creditor's solicitor an indemnification agreement intended to save the sheriff harmless with respect to any loss or damage arising out of the enforcement of the judgment".[58] We shall return at a later juncture to the jurisdic-

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form of a writ of execution, contains, in part, a command to the sheriff that he must, "if required so to do, make appear to our Justices of the Supreme Court of Ontario in what manner you shall have executed this our writ". Rules 552-55 of the Rules of Practice govern the making of a return to a writ of execution.

[54] (1867), 13 Gr. 84, at 89.

[55] (1859), 18 U.C.Q.B. 498.

[56] *Supra*, note 53.

[57] Commission Report, *supra*, note 1, Part I, at 136. See, also, Dunlop, *supra*, note 5, at 385-86. Dunlop stated that, in the absence of any instructions by a creditor, "the sheriff's responsibility is only to keep the writ on file and take it into account on any subsequent distribution of funds as a result of an execution by another creditor" (*ibid.*, at 384, *n.* 96). However, he also stated that "it would appear to be wrong for the sheriff to refuse to seize simply because the creditor refuses to supply . . . information" concerning property in respect of which the debtor has some exigible right, title, or interest (*ibid.*, at 385).

[58] Commission Report, *supra*, note 1, Part I, at 136-37 (footnote reference omitted). But see *Harold v. Stewart* (1864), 3 P.R. 335, dealing with execution in an ejectment action, where Adam Wilson J. stated (at 338) that "it is said that the Sheriff cannot refuse to obey the writ unless he is indemnified". Adam Wilson J. also said (*ibid.*) that earlier "it was supposed he [the sheriff] was entitled to require indemnity from the claimant before executing the writ . . .". See, also, Dunlop, *supra*, note 5, at 386 and 393-94.

tion of a sheriff to initiate active enforcement measures subsequent to the filing of a writ.[59] Suffice it to note here that the sheriff is under no duty to execute the writ where it is not in proper form or is not properly endorsed.

Where the sheriff does initiate active enforcement measures, it is clear that the writ is an absolute justification for what he does pursuant to it, provided his actions are authorized by the writ,[60] the writ is regular on its face,[61] the sheriff has no reason to question its regularity,[62] and the writ issues out of a court of competent jurisdiction.[63] The sheriff enjoys this protection even if the judgment on which the writ is founded is subsequently set aside because of an irregularity or because it is in fact a nullity.[64] In *McPhail v. McKinnon*,[65] constables seized and sold the plaintiff's horse under an execution issued after the debt had been paid. The execution, being regular on its face and within the jurisdiction of the magistrates who issued it, was held to justify the constables' actions. Young C.J. stated that "it would never do, if there be some latent irregularity, either in the judgment or the execution, of which the officer knows nothing, to subject him to an action". The constables had admitted, however,

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[59] See *infra*, this ch., sec. 6(b).

[60] The sheriff will not escape liability if he goes beyond what is authorized by the writ, for example, by seizing goods of the wrong person, remaining in possession of the goods for an unreasonable time, or seizing in an unlawful manner. See, for example, Dunlop, *supra*, note 5, at 383, and *Moodie v. Dougall*, *supra*, note 52, at 560-61.

[61] See *Overn v. Strand*, [1931] S.C.R. 720, at 730, [1932] 1 D.L.R. 490 (subsequent references are to [1931] S.C.R.). In the United States, see, generally, Freeman, *A Treatise on the Law of Executions in Civil Cases* (3d ed., 1900), para. 101. For an apparently broader statement of the law, see *Gosset v. Howard* (1845), 10 Q.B. 411, 116 E.R. 158, at 173, discussed in Dunlop, *supra*, note 5, at 382-83.

[62] See Dunlop, *supra*, note 5, at 383. If the sheriff, for example, has notice of some error, but persists in executing, he may be found liable (*Belshaw v. Marshall* (1832), 4 B. & Ad. 336, 110 E.R. 482 (K.B.)). This will also be the case where he executes with knowledge of a stay of proceedings (*Cleghorn v. Des Anges* (1819), 3 Moore C.P. 83), or that the debt has been paid or the execution has been countermanded. See, also, *Barker v. St. Quintin* (1844), 12 M. & W. 441, 152 E.R. 1270 (Exch.), and *Brewster v. Christian*, [1939] 2 D.L.R. 128 (N.S.S.C.).

[63] See *Shergold v. Holloway* (1735), 2 Str. 1002, at 1002, 93 E.R. 995, at 996 (K.B.), where it was held that the executing officer was liable, "there being no pretence for . . . a jurisdiction" to grant the warrant on the part of the judge.

[64] See *Overn v. Strand*, *supra*, note 61; *Brown v. Watson* (1871), 23 L.T. 745 (Exch.); *Jones v. Williams* (1841), 8 M. & W. 349, 151 E.R. 1073 (Exch.); *Bourgeois v. Gilbert* (1879), 19 N.B.R. 353 (S.C.); *R. v. Monkman* (1892), 8 Man. R. 509 (C.A.); *Law v. Lovell* (1915), 49 N.S.R. 282, 25 D.L.R. 37 (S.C.); *R. v. Finlay* (1901), 13 Man. R. 383, 4 C.C.C. 539 (C.A.); *R. v. Mudry*, [1935] 4 D.L.R. 358, [1935] 2 W.W.R. 225 (Man. C.A.); and *King v. Harrison* (1812), 15 East 612, 104 E.R. 974 (K.B.). However, in the latter case, it was noted (*ibid.*, at 15 East 615) by way of *obiter dicta* that, "in *Philips v. Biron* [(1722), 1 Str. 509, 93 E.R. 667 (K.B.)], the distinction seems to have been admitted by the Court between an erroneous judgment afterwards reversed by a Court of Error, and a judgment vacated for irregularity by the Court which gave it; considering that in the one case the fault was in the Court; in the other it was attributable to the party or his attorney". In *Philips*, it was held that, "in the case of error it is no fault of the party, but of the court, and therefore binds till reversed" (at 1 Str. 509). Presumably, then, in the latter case the sheriff would be protected if he acted on a writ issued pursuant to the judgment. In the United States, see Freeman, *supra*, note 61, para. 101.

[65] (1868), 7 N.S.R. 168 (S.C.).

that they had notice of some objections to the execution prior to sale. Young C.J.'s views concerning whether they were nonetheless justified in selling are instructive:[66]

> That a constable receiving such notice, and having reason to believe that it is true, should suspend the sale, will be readily admitted. But suppose the notice comes under suspicious circumstances, just before the holding of the sale, and that the constable does not believe it, has no evidence tendered of the fact, is he to pause, and render the levy[,] it may be[,] ineffective to the creditor? Here the plaintiff avers nothing but the simple fact of notice before the sale, how long before, how and by whom given, and under what circumstances is not stated. This is very different from the regular and formal notice of a docquet having been struck against a bankrupt, transferring the property, in the case cited from 1 *B. & Ad.*, 370.
>
> We are asked to decide that a mere notice from anybody, of an alleged defect in an execution, shall arrest the sale by a constable, – a privilege too large, and too liable to abuse, as we think, to be sustained.

(b) Wrongful Seizure

While it may be said that the sheriff is protected from liability where the writ of execution is regular on its face and issued by a court of competent jurisdiction, he is clearly not protected where he acts beyond the authority given by the writ. For example, he may be held liable in trespass or conversion for a wrongful seizure – that is, where he seizes goods that do not belong to the debtor or in respect of which the debtor has no seizable right, title, or interest, or where he seizes goods of too high a value relative to the amount of the execution debt, or where he seizes goods in a manner that is unlawful.

(i) Seizing the Wrong Person's Property

It has long been orthodox law that, where the sheriff seizes property under a writ of execution, he does so at his peril, in that he renders himself liable to the owner or person entitled to possession[67] if he levies execution against goods that do not belong to the debtor.[68] Indeed, it appears that the sheriff will be held liable to the owner of the goods not only where the error is solely that of the sheriff, but also where the writ itself directs the sheriff to the wrong goods.[69] While the sheriff cannot escape liability simply by returning the goods to the owner – in trespass, the sheriff would

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[66] *Ibid.*, at 169-70.

[67] See *Street v. Hamilton* (1838), 3 O.S. 151 (Q.B.); *Porter v. Flintoff* (1857), 6 U.C.C.P. 335; and *Paterson v. Maughan* (1876), 39 U.C.Q.B. 371. See, also, *Duffill v. Spottiswoode* (1828), 3 Car. & P. 435, 172 E.R. 490 (N.P.); and *Henderson v. Moodie* (1847), 3 U.C.Q.B. 348.

[68] See *Coote v. Lighworth* (1596), Moo. K.B. 457, 72 E.R. 692; *Oughton v. Seppings* (1830), 1 B. & Ad. 241, 109 E.R. 776 (K.B.); and *Overn v. Strand*, *supra*, note 61.

[69] In *Jarmain v. Hooper* (1843), 6 Man. & G. 827, 134 E.R. 1126 (C.P.), the sheriff levied against the debtor's father, not the debtor; both father and son had the same first and last names, and the address of the father was endorsed on the writ. The sheriff was still found liable.

be liable without proof of actual damage – such action can serve to mitigate the damages otherwise recoverable.[70]

The difficult position of the sheriff may be alleviated, at least to some extent, by the following: the existence of indemnification agreements executed by instructing creditors' solicitors for the benefit of the sheriff; his apparently implied right to sue the instructing creditor for indemnification in the absence of a contractual agreement; and the sheriff's right to apply to the court for relief by way of interpleader. However, the right to require an indemnification agreement as a precondition to a levy cannot be maintained, at least in those jurisdictions, like Ontario, that have not legitimized such an agreement by express legislation.[71] We shall return to this issue and to extra-contractual actions for indemnification in a subsequent portion of this chapter.[72]

With respect to the protection of sheriffs by means of the interpleader process – the process by which a sheriff may apply to the court for protection from liability and to resolve disputes where a claim is made to property seized or about to be seized[73] – reference should be made to our discussion in Part II of this Report.[74] Having regard to the previous consideration of the topic, we shall mention interpleader here only insofar as it relates to the protection of sheriffs.

It should be emphasized that, in the main, the court's power to grant to the sheriff "relief by way of interpleader" under the Rules of Practice[75] is discretionary; the sheriff will not invariably be protected from liability by means of interpleader proceedings. An exception to the principle that relief by way of interpleader is within the discretion of the court exists under Rule 644, although the exception is narrowly circumscribed. Rule 644, which deals expressly with the protection of the sheriff, applies only where the property seized or to be seized is in the debtor's possession; it does not apply where the property is in the sole possession of a third party. The Rule provides for the procedure by which a claim to such property may be made, and states that, where the claimant's title is admitted by the execution creditor and notice is given under Rule 644, "no action shall be brought against the sheriff in respect of the seizure of the property".

It has been suggested that the protection afforded under Rule 644 "would appear to be absolute and unlimited".[76] Where "the rule applies, it

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[70] See *Paterson v. Maughan*, *supra*, note 67.

[71] See, for example, *Execution Creditors Act*, R.S.A. 1980, c. E-14, s. 4(2), which expressly permits such agreements.

[72] See *infra*, this ch., secs. 5(a), 5(c)(ii), 6(b)(i)b., and 6(b)(ii).

[73] See Rules of Practice, *supra*, note 53, rr. 632-55. For bailiffs' interpleader, see small claims courts Rules of Procedure, R.R.O. 1980, Reg. 917, ss. 7-12.

Some courts have noted in passing that the sheriff ought to have sought protection by means of interpleader proceedings where a problem has arisen in respect of a seizure, since the alternative is courting an action for trespass or conversion. See, for example, *Moodie v. Dougall*, *supra*, note 52, at 558.

[74] Commission Report, *supra*, note 1, Part II, at 259 *et seq*.

[75] See rr. 632 *et seq*. of the Rules of Practice, *supra*, note 53.

[76] Dunlop, *supra*, note 5, at 395.

is difficult to see what discretion remains in the court, no matter how real or substantial the grievance".[77] However, the protection afforded by Rule 644 may not necessarily be "absolute and unlimited". The closing flush of Rule 644, quoted above, can reasonably be interpreted as giving protection to a sheriff for the act of seizure alone, but may afford no protection where, for example, the sheriff has caused damage to the seized property or to the premises because of his negligence or recklessness.

Regardless of the precise nature and scope of the protection given to sheriffs as a result of interpleader proceedings,[78] it would appear that, in many cases, no similar type of protection is afforded where an interpleader application has not been made, even though prior to a sale of seized property the sheriff's impugned actions, and the loss, if any, caused by such actions, are the same. Where, upon receipt of an undisputed claim to ownership, the sheriff returns the property to the claimant without interpleading, no real damage may be caused. Yet, the sheriff will be liable for trespass or, perhaps, conversion, although only nominal damages may in fact be awarded. Notwithstanding the potentially different results, depending on whether the sheriff has interpleaded, it is arguable that such results are not fortuitous; rather, the different rules may well be designed to encourage sheriffs to apply to the court before completing the enforcement process and causing possibly serious or irreparable harm to a third party.

(ii) Excessive Seizure

Rule 548(1) of the Supreme Court of Ontario Rules of Practice[79] provides, in part, that "[e]very writ of execution for the recovery of money shall be endorsed with a direction to the officer to whom it is directed to

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[77] *Ibid.* The reference to a "real" or "substantial" grievance is to the English interpleader practice which, Dunlop has argued, differs from that in Ontario. Dunlop stated as follows (*ibid.*, at 394-95 (footnote reference omitted)):

> In England, the grant of an interpleader order (or a protection order where the execution creditor has conceded the claim of a third party) is discretionary, and there is a line of cases suggesting that the order will be granted and the sheriff protected unless he has committed a 'real' or a 'substantial' grievance against the third person.
>
> For example, if there is no grievance beyond the mere entry onto the premises and the seizure itself – if the sheriff is not destructive or oppressive – then no liability will be forthcoming: see, for example, *Smith v. Critchfield* (1885), 14 Q.B.D. 873 (C.A.); *Duncan v. Tees* (1885), 11 P.R. 66; *Cave v. Capel*, [1954] 1 Q.B. 367, [1954] 1 All E.R. 428 (C.A.); and *De Coppett v. Barnett* (1901), 17 T.L.R. 273 (C.A.).

[78] Assuming that r. 644 does protect the sheriff for certain enforcement activities, there appears to be some inconsistency in the law. As we have seen, a sheriff who fails to interplead is liable in trespass without proof of actual damage for a wrongful seizure of property not belonging to the debtor, whereas where he does interplead, and where r. 644 applies, the sheriff appears to be automatically protected in respect of his trespass. Moreover, where r. 644 does not apply – that is, where the court's decision to grant "relief by interpleader" is discretionary (see, for example, rr. 634, 635, 642, and 645 of the Rules of Practice, *supra*, note 53, respecting such "relief") – a sheriff might well be saved harmless. But, again, where no interpleader application is made, liability in trespass appears to be absolute, without proof of actual damage.

[79] *Supra*, note 53.

levy the money due and payable and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon . . .". Rule 550 provides that, "[u]pon every execution there may be levied, in addition to the sum recovered by the judgment and interest thereon, the fees and expenses of execution".[80] These rules provide the general limits, regarding the quantum of property to be seized, beyond which a sheriff may not go when effecting a seizure. In *Gawler v. Chaplin*,[81] it was stated that "[t]he duty of the sheriff is confined to seizing goods that would be reasonably sufficient, if sold, to pay the sum indorsed on the writ – that is, the debt, interest upon the debt, poundage, and expenses; and if the sheriff seizes more, prima facie he is a wrongdoer". The Ontario *Creditors' Relief Act*[82] is, however, unclear whether the sheriff, in assessing how much property to seize, must look only to the writ of the instructing creditor or to all existing, unsatisfied writs. In this connection, one commentator has made the following observations:[83]

> Some creditors' relief statutes have expressly changed the common law by requiring the sheriff executing one writ to seize sufficient property to satisfy all subsisting writs filed in his office and entitled to share in the proceeds. The same result is arguably a necessary implication of any such legislation, even if it has not been spelled out.

It bears mentioning here that the Commission has in fact made proposals for reform that, if implemented, would require the sheriff to realize from the debtor's exigible assets an amount sufficient to satisfy the debts owing to all execution creditors.[84]

In order to determine whether the quantity of goods seized is reasonably sufficient to pay the amount of the writ and other allowable amounts, courts have looked at the nature and marketability of the goods. If the debtor has but one exigible asset and it is indivisible – for example, a car – it is not an excessive seizure to levy execution upon it even if it is worth several times the amount of the debt.[85] Further, if it is doubtful whether a significant amount of money could be raised from the sale of the property, the court is less likely to find the seizure excessive. For example, in *Watson v. Murray & Co.*,[86] the Court chose not to find the levy excessive because of the hazards attending the execution sale of fashion and seasonal goods. Many courts have "[restricted] the sheriff's liability to cases where the sei-

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[80] See, also, Form 115 under the Rules of Practice, *supra*, note 53, and the *Creditors' Relief Act*, R.S.O. 1980, c. 103, s. 4(7), dealing with the sheriff's entitlement to poundage.

[81] (1848), 2 Exch. 503, at 507, 154 E.R. 590. See, also, *Pitcher v. King* (1844), 5 Q.B. 758, 114 E.R. 1436; *Slade v. Hawley* (1845), 13 M. & W. 757, 153 E.R. 318 (Exch.); *Watson v. Murray & Co.*, [1955] 2 Q.B. 1, [1955] 1 All E.R. 350; and *Overn v. Strand*, *supra*, note 61, at 732-33.

[82] *Supra*, note 80.

[83] Dunlop, *supra*, note 5, at 384 (footnote references omitted). See, also *ibid.*, at 387.

[84] Commission Report, *supra*, note 1, Part I, at 189, Recommendation 145. See, also, discussion, *ibid.*, at 142-43.

[85] See, for example, *Wooddye v. Coles* (1595), Noy. 59, 74 E.R. 1027 (K.B.), and Hawkins, "What is an Excessive Levy?" (1961), 35 Aust. L.J. 71.

[86] *Supra*, note 81.

zure was clearly or obviously excessive, taking into account the difficulties in predicting the likely return at a sheriff's sale".[87]

There seems to be some uncertainty whether, and if so under what circumstances, an aggrieved party must prove malice on the part of the sheriff in an action for excessive seizure. The orthodox opinion appears to be that malice need not be shown.[88]

(iii) Failure to Seize and Insufficient Seizure

In the preceding section, we considered the liability of a sheriff for an excessive seizure. However, the sheriff may also expose himself to an action by a creditor where he fails to seize exigible property or where he seizes property the value of which cannot satisfy the debt. In both cases, as in the case of an excessive seizure, the courts generally apply a standard of reasonableness to the actions of the sheriff.

The valuation of property is, in many instances, an extremely subjective exercise. Accordingly, the courts are apt to be more lenient where the sheriff has made an honest error. However, the courts are more reluctant to exonerate the sheriff where his inactivity or limited activity is the result of unjustifiable delay or a lack of knowledge of the existence or location of the debtor's property that may be attributable to the sheriff's indolence or neglect of duty. Once a writ is delivered to the sheriff with instructions to enforce it, it appears that his duty is to use reasonable diligence to search out, or make inquiries about, the assets of the debtor within his bailiwick[89] and then to levy execution.[90] On the other hand, it has been said that the

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[87] Dunlop, *supra*, note 5, at 387 (footnote references omitted). Dunlop cited *Mandelin v. Stan Reynolds Auto Sales Ltd.* (1961), 31 D.L.R. (2d) 697 (Alta. S.C., T.D.), and *Moore v. Lambeth County Court Registrar (No. 2)*, [1970] 1 Q.B. 560, [1970] 1 All E.R. 980 (C.A.) (subsequent reference is to [1970] 1 Q.B.).

[88] See *Moore v. Lambeth County Court Registrar*, *supra*, note 87, and Dunlop, *supra*, note 5, at 387. However, the Ontario case of *Ventris v. Brown* (1872), 22 U.C.C.P. 345, has been cited as representing the contrary view: see Dunlop, *supra*, note 5, at 387, *n.* 29. The latter view has been said to rest on a distinction in the case law between one kind of excessive seizure, where there is a seizure of goods whose value "clearly" or "obviously" exceeds the amount of the writ, and another kind of excessive seizure, where the creditor, having previously received partial payment, proceeds to issue execution for the full amount.

The case of *Ventris v. Brown*, which falls into the second category, was an action against the execution creditors, not the sheriff, where a portion of the debt had been paid but where the creditors issued execution for the full amount. Gwynne J., for the Court, deciding for the creditors, held (at 347) that "the count here demurred to is insufficient, without the allegation that the Act complained of was done maliciously and without probable cause". While the issue of the sheriff's liability did not arise, presumably the sheriff could not be held liable for the excessive seizure if the writ was regular on its face and issued from a court of competent jurisdiction, unless the sheriff had knowledge, for example, that the debt had been partially paid or that the writ was in fact irregular.

[89] See *Hutchings v. Ruttan* (1857), 6 U.C.C.P. 452; *Robinson v. Grange* (1859), 18 U.C.Q.B. 260; and *Olsen v. Van Wart* (1910), 13 W.L.R. 661 (Alta. S.C.).

[90] See *Dennis v. Whetham* (1874), L.R. 9 Q.B. 345; *Massey Mfg. Co. v. Clement* (1893), 9 Man. R. 359 (C.A.); and *Ayshford v. Murray* (1870), 23 L.T. 470 (Q.B.). See, also, *infra*, this ch., sec. 5(a).

sheriff "is not expected to find assets which are not visible in the possession of the debtor",[91] unless, of course, he has reason to believe that such assets exist and he has knowledge of their whereabouts. Nor is the sheriff required to take extraordinary measures, such as watching day and night for weeks in succession in order to gain admittance to a house in order to execute a writ.[92]

It has been held that "[a]n action against a sheriff for not levying under a writ of *fi.fa.* [or, presumably, for an insufficient levy] . . . will not lie unless the plaintiff has suffered actual and pecuniary damage by the sheriff's neglect"; in such a case, the plaintiff "is entitled to be placed in the same position, by means of damages, as if the sheriff has done his duty".[93] *Prima facie*, the measure of damages is the difference between the full amount of the writ and the amount realized from a sale of any goods actually seized. The sheriff is not liable for the full amount of the writ unless the whole amount is lost and, by the exercise of due diligence, the sheriff could have seized sufficient goods to satisfy the writ in full. While a heavy burden is placed on the sheriff to justify his failure to levy or his insufficient levy, the courts have often attempted to lessen the burden by a rather liberal use of the "due diligence" or reasonableness standard in favour of the sheriff.

(iv) Sheriff's Application to the Court for Directions

One cause of an excessive seizure or an insufficient seizure may be the sheriff's incorrect assessment of what goods are exempt.[94] The sheriff may either overestimate or underestimate the number or value of items that the debtor may retain, having regard to sections 2 to 7 of the *Execution Act*.[95] However, the sheriff's difficulty is again partially alleviated, this time by section 8(2) of the *Execution Act*. Section 8(2) provides as follows:

> 8.-(2) A sheriff may apply to the county or district court of the county or district of which he is the sheriff for direction on any matter arising under sections 2 to 7.

(v) Manner of Seizure

Aside from the rather bewildering set of rules discussed in a previous Part of this Report, respecting the permissible use of force by a sheriff in the execution of a writ,[96] there are certain other prohibitions that, if not recognized, could lead to liability. For example, the sheriff will be held liable for trespass if he remains for an unreasonable length of time on the

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[91] Dunlop, *supra*, note 5, at 384.

[92] See *Finnigan v. Jarvis* (1851), 8 U.C.Q.B. 210.

[93] *Massey Mfg. Co. v. Clement*, *supra*, note 90, at 369-70.

[94] See, generally, Commission Report, *supra*, note 1, Part II, at 79 *et seq*. See, also, *Winn v. Ingilby* (1822), 5 B. & Ald. 625, 106 E.R. 1319 (K.B.).

[95] R.S.O. 1980, c. 146.

[96] See, generally, Commission Report, *supra*, note 1, Part II, at 106 *et seq*. See, also, Dunlop, *supra*, note 5, at 388 *et seq*.

property on which the exigible goods are found.[97] Moreover, it appears that he will be liable if seizure is effected on a Sunday or beyond his bailiwick.[98]

(c) Safeguarding of Seized Property

It is the duty of the sheriff to safeguard seized property until it has been sold.[99] But the sheriff generally will be liable only where he has been negligent in this regard.[100] The obligation to safeguard the property will, of course, be easier to fulfil where the property has been physically seized by the sheriff and placed in a location under his control. However, the sheriff frequently stores seized property in warehouses owned by others. In other cases, the sheriff may take "walking possession" of the seized property; that is, he may permit the debtor to retain physical possession of the property until the debt is satisfied or until the property is about to be sold at an execution sale. The debtor is required to sign an acknowledgment that the property is held for the sheriff and an undertaking that he, the debtor, will return the property to the sheriff on demand.[101]

In Part II of this Report, the Commission endorsed the practice of a sheriff taking "walking possession" of seized property where the sheriff is of the view that "it is not feasible or desirable to seize and remove property from the possession of the debtor or another person".[102] Under the Commission's proposals, the initial decision to take "walking possession" would rest with the sheriff, although the creditors and any person refused the right to retain possession would be entitled to appeal the sheriff's decision to the county or district court. We believe that this right of appeal, as well as the continued right to sue the sheriff for negligence with respect to the taking of "walking possession", or indeed with respect to the safeguarding of seized property generally, would be an adequate protection for the rights of all persons interested in the fate of such property.

(d) Sale of Seized Property

The Commission has already considered the law respecting the time, notice, location, and manner of sale of seized property.[103] In the course of that discussion, we outlined the duties of the sheriff – for example, the general duty to sell the property within a reasonable time, to give notice of the sale to the appropriate persons and in the appropriate places, to sell

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[97] See *Ash v. Dawnay* (1852), 8 Exch. 237, 155 E.R. 1334, and *Watson v. Murray & Co.*, *supra*, note 81.

[98] With respect to seizure on a Sunday, see *Sowell v. Champion* (1838), 6 Ad. & E. 407, 112 E.R. 156 (K.B.). With respect to seizure beyond the bailiwick, see *Malouf v. Labad* (1912), 3 O.W.N. 1235, 22 O.W.R. 99 (Div. Ct.), and *Reliance Loan & Savings Co. v. Goldsmith* (1910), 3 Alta. L.R. 197, 15 W.L.R. 53 (S.C.).

[99] See, generally, Commission Report, *supra*, note 1, Part II, at 113 *et seq.*

[100] See *McDonald v. Nupert* (1859), 4 Nfld. L.R. 376 (S.C.), and *Willis, Winder & Co. v. Combe* (1884), Cab. & El. 353, 1 T.L.R. 36 (Q.B.).

[101] See *supra*, note 99. See, also, Dunlop, *supra*, note 5, at 391-92.

[102] Commission Report, *supra*, note 1, Part II, at 117.

[103] *Ibid.*, at 119 *et seq.*

the property away from the debtor's premises, to sell by auction at least initially, to conduct the sale in such manner as to obtain a fair and reasonable price, and to adjourn the sale if no such price is attainable. The sheriff is also under a duty to distribute the proceeds of sale according to the *Creditors' Relief Act*,[104] and to return any surplus proceeds to the person or persons entitled to them. Not all irregularities or defects in respect of the sale of seized property will give rise to liability on the part of the sheriff;[105] moreover, in an action against the sheriff, the plaintiff must prove that he has suffered actual damage.[106]

It bears noting that, at an execution sale, the sheriff ordinarily will not give any warranties concerning the title to, or the quality of, the goods to be sold;[107] consequently, persons purchase at their peril.[108] On the other hand, it may be that the sheriff impliedly promises that he does not have knowledge of any defect in title.[109] If the sheriff may be held liable on this basis, "[*a*] *fortiori*, where the sheriff departs from the normal practice and expressly warrants title, he will be liable in damages",[110] although there may be some question whether the sheriff is liable in respect of a representation where the purchaser is as able as the sheriff to judge the value of the property upon inspection.[111]

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[104] *Supra*, note 80.

[105] The issue of the sheriff's liability must be distinguished from the setting aside of a sale: a sale will not be set aside merely because there has been some defect or irregularity – for example, with respect to advertisements – that might give rise to liability on the part of the sheriff. Of course, in some instances, avoidance of the sale and liability will arise from the same act – for example, where the goods sold do not belong to the debtor (see *Overn v. Strand*, *supra*, note 61; *Commercial Credit Corp. Ltd. v. Niagara Finance Co. Ltd.*, [1940] S.C.R. 420, [1940] 3 D.L.R. 1; and *Davies v. Traders' Finance Corp.* (1959), 18 D.L.R. (2d) 48 (Ont. C.A.)), or where the goods are exempt (see *Fletcher v. Pendray* (1916), 10 W.W.R. 444 (B.C.C.A.)).

[106] See *Maple Leaf Lumber Co. v. Caldbick* (1917), 40 O.L.R. 512 (App. Div.), and *Hobson v. Thelluson* (1867), L.R. 2 Q.B. 642.

[107] See *Taugen (Tangen) v. Vanderburgh (Vanderberg)* (1908), 1 Alta. L.R. 498, 9 W.L.R. 269 (S.C.). See, also, *Seizures Act*, R.S.A. 1980, c. S-11, s. 36, which provides as follows: "On the sale by the sheriff of goods pursuant to a writ of execution . . . the sale shall be without warranty of title and the purchaser, on paying the purchase price, thereby acquires the precise interest and no more in the goods that are so sold and that are lawfully sold under execution . . .".

[108] For example, in *Overn v. Strand*, *supra*, note 61, at 733-34, it was said that a purchaser can obtain clear title only if "the court issuing the writ had jurisdiction to do so; . . . the writ is regular on its face, and . . . the goods sold by the sheriff are the goods of the execution debtor". An execution sale may be declared void in other circumstances as well – for example, where exempt goods are sold: see *Fletcher v. Pendray*, *supra*, note 105. With respect to the position of the purchaser, see Dunlop, *supra*, note 5, at 402 *et seq.* Where the sale is declared void, the purchaser would have to account to the aggrieved party: see *Overn v. Strand*, *supra*, note 61, and Dunlop, *supra*, note 5, at 403.

[109] See *Taugen (Tangen) v. Vanderburgh (Vanderberg)*, *supra*, note 107.

[110] Dunlop, *supra*, note 5, at 402. See *Mink v. Jarvis* (1852), 13 U.C.Q.B. 54; *Moritz v. Christopherson* (1911), 18 W.L.R. 63 (Sask. Q.B.); and *Shapiro v. Banque Canadienne Nationale*, [1981] 4 W.W.R. 560 (Man. Q.B.).

[111] See *Mink v. Jarvis*, *supra*, note 110.

5. LIABILITY OF THE CREDITOR AND HIS SOLICITOR FOR SEIZURE AND SALE OF PROPERTY: PRESENT LAW

(a) General

As already indicated, sheriffs are generally loath to engage in active enforcement measures without receiving from the execution creditor or his solicitor information respecting the nature and whereabouts of the debtor's property. However, as a matter of law, and in the absence of any statutory provision to the contrary, it would seem that the sheriff cannot refuse to act unless such information is provided.[112]

On the other hand, it would also appear that, as a precondition to any active enforcement measures taken by the sheriff, the creditor or his solicitor must actually instruct the sheriff to proceed in the execution of the writ; notwithstanding the express language of the writ, the failure to direct the sheriff to execute it might well be a defence to an action against the sheriff by the creditor.[113] This apparently legal[114] and, more importantly, practical,[115] requirement to instruct the sheriff is a potential source of liability for the execution creditor and his solicitor.[116]

In the first place, as mentioned earlier in passing, there may well be an implied indemnity agreement between the sheriff and the creditor, although the "principle underlying [the relevant] cases is not altogether certain"[117] and "[i]t is not clear whether this kind of imputed indemnity action could or should be extended to every tort committed by the [sheriff] in the course of a levy".[118] In the second place, the solicitor's ordinary status as agent for his client, the execution creditor, may well give rise to liability on the part of the creditor for acts done by the solicitor. The general picture has been summarized as follows:[119]

> It is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a fi. fa. verbally to direct the sheriff to seize particular goods,[120] but this is a rule as to the scope of a solicitor's authority under the

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112 See Dunlop, *supra*, note 5, at 385-86.

113 *Ibid.*, at 386.

114 *Ibid.* Some jurisdictions have expressly prohibited the sheriff from effecting a seizure in the absence of instructions from the creditor to this effect: see, for example, the *Execution Creditors Act*, R.S.A. 1980, c. E-14, s. 4(1).

115 See Dunlop, *supra*, note 5, at 385.

116 In some jurisdictions, legislation expressly provides for liability. Section 12 of the New Brunswick *Sheriffs Act*, R.S.N.B. 1973, c. S-8, provides that "[t]he solicitor who issues a process and the party on whose behalf he is acting are severally liable to the sheriff for executing it".

117 Dunlop, *supra*, note 5, at 394 (footnote reference omitted). In some cases, the sheriff has sought an express indemnity agreement from the creditor: see, for example, *Corbett v. O'Reilly* (1850), 8 U.C.Q.B. 130, at 131.

118 Dunlop, *supra*, note 5, at 394.

119 3 C.E.D. (Ont. 3d) 16, §73 (footnote references omitted). The cases of *Smith v. Keal* (1882), 9 Q.B.D. 340 (C.A.) and *Wilkinson v. Harvey* (1888), 15 O.R. 346 (H.C.J.) were cited. See, also, *Cordery's Law relating to Solicitors*, *supra*, note 52, at 92, 102, and 106.

120 But see Dunlop, *supra*, note 5, quoted at text to note 144, *infra*. In *Taylor v. Robertson* (1901). 31 S.C.R. 615, at 631, Davies J. noted the actions "of solicitors *going beyond ana outside of their duty* and officiously pointing out to the sheriff spec-

ordinary instructions in a suit. If clients desire their solicitors to act for them as men of business, to travel and interview their debtors, to endeavour to make arrangments with them, and to serve process in aid of their endeavours, leaving it to them to act according to their discretion, an agency is established which takes the clients out of the protection of such rule, and leaves them liable for any and every act taken to further their interests, and to achieve the purpose for which the solicitors or agents were employed. Moreover, such acts may be ratified.[121]

(b) Liability of the Creditor

(i) Improper Issuance of a Writ

It has been said that a person irregularly issuing a writ is personally liable for all costs of the sheriff arising from actions taken under it, even though they were taken after the sheriff had become aware that the writ had been set aside by the court.[122] If there is no judgment and the creditor issues a writ of execution,[123] or if he allows the writ to be executed once it has been set aside,[124] the creditor will be liable for trespass or conversion for a seizure made thereunder. Further, if the creditor is responsible for the issuance of an irregular writ of execution that is subsequently set aside, he will also be liable. After, for example, the judgment is paid in full,[125] or the creditor agrees to a composition arrangement,[126] any writ of execution issued will be irregular.

Not only will a creditor be liable for excessive seizure if he issues the

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ific personal property as that of the defendant and requiring him to sell . . ." (emphasis added).

121 With respect to the indemnification of a solicitor by his client, see *Cordery's Law relating to Solicitors*, *supra*, note 52, at 102 (footnote references omitted):

> The relationship existing between a client and his solicitor may often be that of principal and agent, and where such relationship exists there seems to be no reason why the ordinary rule which obliges a principal to indemnify his agent should be rendered inapplicable merely because the agent is a solicitor. So, also, if a solicitor performs at the request of his client acts which are not in themselves manifestly tortious to the solicitor's knowledge but which turn out to be injurious to a third party, the solicitor should be entitled to an indemnity from his client.

The relationship between the creditor and his solicitor, insofar as it affects the former's liability for a wrongful seizure, is considered *infra*, this ch., sec. 5(b)(ii). For example, the sheriff may succeed in obtaining from the creditor's solicitor a personal indemnification agreement that, having regard to the solicitor's position *vis-à-vis* his client, may impose liability on the part of the creditor. In one case, *Muirhead v. Shirreff* (1886), 14 S.C.R. 735, at 735, it was held that "a promise of indemnity to the sheriff by an attorney is binding on his client where the attorney had the conduct of the suit in the course of which such promise was made and the subsequent acts of the client showed that he had adopted the attorney's proceedings".

122 *Perkins v. Plympton* (1831), 5 Moo. & P. 731, 7 Bing. 676, 131 E.R. 261 (C.P.).

123 See Anderson, *supra*, note 6, at 65.

124 See *Jones v. Williams* (1841), 8 M. & W. 349, 151 E.R. 1073 (Exch.), and *Cobbold v. Chilver* (1842), 4 M. & G. 62, 134 E.R. 26 (C.P.). However, liability will not be imposed merely because the judgment is reversed on appeal: see *Robertson v. Miller* (1904), 3 N.B.Eq.Rep. 494 (S.C. in Eq.).

125 See *Bates v. Pilling* (1826), 6 B. & C. 38, 108 E.R. 367 (K.B.), and *Mooney v. Maughan* (1875), 25 U.C.C.P. 244.

126 See *Phillips v. General Omnibus Co.* (1880), 50 L.J.Q.B. 112.

writ after the original debt has been paid, he will also be liable if he incorrectly endorses the writ with an amount exceeding the original debt or exceeding the amount owed at the time and a seizure is made.[127] As we have seen,[128] it has been held that, where partial payment has been made, but the creditor nonetheless endorses the writ for the full amount, the debtor will succeed in his suit against the creditor only if he is able to establish malice or want of reasonable and probable cause. Where, however, the writ is issued after full payment or is endorsed with an amount that exceeds the original amount due, the debtor apparently does not have to meet this requirement; nor, it seems, does he have to prove actual damage.[129]

(ii) Wrongful Seizure

It has sometimes been said that, when the sheriff engages in active enforcement measures, he does so as an officer of the court and not as an agent or servant of the execution creditor.[130] On the other hand, it has also been stated or assumed on many occasions that the rationale for imposing liability on a creditor for the wrongful actions of the sheriff ultimately rests on the principle that, at least for the purpose of executing the writ, the sheriff acts as the agent of the creditor.[131] It seems likely that the denial of agency status in some of the cases is merely an attempt to describe the rather unique position of the sheriff and his many functions, rather than to characterize his position *vis-à-vis* the instructing creditor for the purpose of determining the basis for attaching any liability to the latter.

In any event, it is clear that a creditor may be held liable for the wrongful acts of the sheriff. However, in order to impose liability upon the creditor for a wrongful seizure, the creditor must be connected to the sheriff's actions in some way. It is not sufficient that the creditor is ultimately the impetus for setting the execution process in motion; before he incurs liability, the creditor must become further involved, for example, by inter-

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[127] See *Clissold v. Cratchley*, [1910] 2 K.B. 244, [1908-10] All E.R. Rep. 739 (C.A.); *Demers v. Desrosiers*, [1929] 3 D.L.R. 401, [1929] 2 W.W.R. 241 (Alta. S.C.); *Ventris v. Brown*, *supra*, note 88; *DeMedina v. Grove* (1846), 10 Q.B. 152, 116 E.R. 59; and *Gilding v. Eyre* (1861), 10 C.B.N.S. 592 (C.P.).

[128] See *supra*, note 88 and supporting text.

[129] See *Demers v. Desrosiers*, *supra*, note 127.

[130] See *Woollen v. Wright* (1862), 1 H. & C. 554, 158 E.R. 1005 (Exch.), and Dunlop, *supra*, note 5, at 395.

[131] See *Williams v. Williams*, [1937] 2 All E.R. 559, 81 So. Jo. 435 (C.A.), and *Barclays Bank Ltd. v. Roberts*, [1954] 1 W.L.R. 1212, [1954] 3 All E.R. 107 (C.A.). See, also, *Graves v. Sprague* (1920), 48 N.B.R. 36, at 38, 53 D.L.R. 337 (S.C., App. Div.), where it was stated:

> The authorities are clear that if a party or his attorney in any way intervenes, directs or takes part in the acts of an officer under an execution, then the party so intervening, directing or taking part constitutes the officer his agent for the purposes of that act, and is responsible for all matters ensuing as a result of the action of the officer.

Other cases have held that, for the purpose of seizing property, the sheriff becomes the "servant" or "bailiff" of the creditor. See, for example, *Morris v. Salberg* (1889), 22 Q.B.D. 614 (C.A.).

vening in or directing the execution process that results in a wrongful seizure.[132] In most cases, the creditor's mere presence at a seizure, as a silent spectator, has been held insufficient to warrant attaching responsibility to the creditor.[133] In several cases, however, it has been said that, if a creditor attends with the sheriff who seizes a third party's goods, he is responsible for the sheriff's acts. But, in these cases, there was in fact evidence that the creditor was more than a silent spectator: he gave directions[134] or assisted in the seizure.[135] A creditor's failure to warn the sheriff about property that could not legally be seized does not amount to a tacit instruction to seize. In *Williams v. Williams*,[136] the landlord-creditor was present at an eviction of his tenants, but he did not tell the sheriff that part of the house was protected from such eviction. He was not held liable for trespass.

Moreover, as indicated,[137] where the creditor directs his solicitor to instruct the sheriff to act in a certain manner, and the sheriff's actions give rise to liability on the part of the solicitor, the creditor ultimately must bear the burden. Where, however, no specific or detailed instructions are given by the creditor, there appears to be a large measure of uncertainty in the law respecting the creditor's liability. The relationship between the execution creditor, his solicitor, and the sheriff – both in law and in practice – is an important one that deserves some further attention. The present English position, and the arguably different Canadian position, have been summarized as follows:[138]

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[132] The creditor, like the sheriff, may sometimes be in a rather difficult position. In *Jarvis v. The Commercial Bank*, *supra*, note 52, the sheriff had already seized property under a prior execution before seizing it again on behalf of the defendants (the creditors). An adverse claim to the seized property having been asserted, the first execution was withdrawn. However, the defendants refused to withdraw their execution or indemnify the sheriff, who was successfully sued by the claimant. The sheriff then sued the defendants, unsuccessfully, for deceit in representing that the property belonged to the debtor. Robinson C.J. noted (at 339) that the agent of the defendants' solicitor "gave no new information to the sheriff, nor did he lead him then to take any step". Robinson C.J. summed up the position of the creditor *vis-à-vis* the sheriff as follows (at 340):

> I cannot say that the negative acts of refusing to direct the goods to be given up, and of refusing to indemnify, can, when put together, amount to a misrepresentation and a legal fraud, and subject the defendants to an action for deceit. If it would, then in every case in which the sheriff asks for indemnity and is refused by the plaintiff, who, nevertheless, does not instruct him to forbear, a recovery against the sheriff by the owner of the goods might be followed by an action against the plaintiff for a deceit.

See, also, *Moodie v. Dougall*, *supra*, note 52, where the defendant-solicitor argued, *inter alia*, that the sheriff should have brought his action for the alleged misrepresentation of the solicitor against the creditor.

[133] See *Moore v. Lambeth County Court Registrar (No. 2)*, *supra*, note 87, at 569, and *Barclays Bank Ltd. v. Roberts*, *supra*, note 131. The same rule applies in the case of solicitors: see *Cordery's Law relating to Solicitors*, *supra*, note 52, at 111.

[134] See *Meredith v. Flaxman* (1831), 5 C. & P. 99, 172 E.R. 894 (N.P.), and *Menham v. Edmonson* (1799), 1 B. & P. 369, 126 E.R. 958 (C.P.).

[135] See *Park v. Taylor* (1852), 1 U.C.C.P. 414.

[136] *Supra*, note 131.

[137] See *supra*, this ch., sec. 5(a), esp. text supporting note 119, *supra*.

[138] Dunlop, *supra*, note 5, at 395-96 (footnote references omitted). See, also, *Cordery's Law relating to Solicitors*, *supra*, note 52, at 111, where it is stated, for example, that

In these circumstances, the English cases have imposed very strict limits on the creditor's liability, based on their view of the solicitor's usual authority. The lawyer is regarded as having authority to endorse upon the writ the name and address of the debtor. If that address is erroneous (being the address of the claimant), and if the sheriff is induced thereby to seize the claimant's goods, the solicitor and the execution creditor will be liable. However, if the sheriff is not in fact induced by the endorsement or if the solicitor conveys the wrong address to him in any way other than by the endorsement, the solicitor but not the execution creditor will be liable. The reason is that the solicitor's usual authority is limited to completing the endorsement on the writ itself and does not extend to giving other written or oral instructions regarding the whereabouts of the debtor's goods.

This peculiar rule seems to be fixed in English law, but it is submitted that Canadian courts can and should take a different approach, based on a broader view of the lawyer's usual authority in collection matters. In most situations, it is suggested that the client simply hands the collection file to his solicitor and asks him to collect the debt. Whether the solicitor communicates with the sheriff by endorsement on the writ or by attached letter or by telephone is a matter of indifference to the creditor as it should be to the courts. Add to this the fact that many Canadian sheriffs do not demonstrate the independence and initiative to search out the debtor's assets without considerable assistance from the creditor's solicitor, and it will be seen that the facts depart substantially from the relationship envisaged in the English cases.

On this view, the creditor would be liable wherever a third person's goods were seized, whether or not he had given specific instructions to his solicitor. This is not an undesirable result where the creditor stands to gain (or at least cut his losses) by the execution, and where he has the means, particularly the examination in aid, to discover what property his debtor has. The Canadian courts have not yet locked themselves into the English cases which should be distinguished on the basis of different circumstances and practices in this country.[139]

From the case law, it would seem that not merely the nature, but also the impact, of the creditor's instructions is important in ascertaining whether the creditor ought to incur liability. If, for example, the sheriff is not induced by an endorsement directing him to seize the goods of a third party, but he does so anyway, the creditor will not be liable.[140] If the creditor merely gives advice in respect of an intended seizure, ordinarily he will not be liable if it is followed by the sheriff; but he will be liable if he commands the sheriff to seize. There appears, therefore, to be a fine, but very important, line drawn between advice and a command. In *Collins v. Evans*,[141] a postjudgment arrest case, the creditor was not held liable for pointing out to the sheriff someone with the same name as the one on the writ of *ca. sa.*, since he had not required the sheriff to act on it. In

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"it is not within the solicitor's authority to give verbal directions to the sheriff for the seizure of specific goods . . .". Accordingly, the solicitor is alone liable (*ibid.*).

[139] In *Jarvis v. The Commercial Bank*, *supra*, note 52, where an agent for the creditor's solicitor had instructed the sheriff, Robinson C.J. refused to consider "whether the [creditors] would be responsible for information of this kind given by their attorney in the cause, *without any instruction from them*" (*ibid.*, at 338; emphasis added).

[140] See *Jarvis v. The Commercial Bank*, *ibid.*, at 338-39, quoted, in part, *supra*, note 132.

[141] (1844), 5 Q.B. 820, 114 E.R. 1459.

Wilkinson v. Harvey,[142] the creditor's solicitor wrote a letter to the sheriff, who had refused to seize because there appeared to be no goods, stating that the sheriff had acted on insufficient information, insisting that he take immediate action, and threatening an action for damages if loss were occasioned through his delay. These acts amounted to a direction to seize. On the other hand, in *Barclays Bank Ltd. v. Roberts*,[143] a phone conversation with the creditor's solicitor advising an ejectment, which turned out to be wrongful, was not sufficient to attach liability to the creditor.

A final issue respecting the liability of an execution creditor for a wrongful seizure concerns the effect of the creditor's conduct subsequent to the seizure. One commentator has offered these comments on the subject:[144]

> Another oddity of English law in this area is that while meddlesome conduct of the execution creditor before the seizure can render him liable to the third party, similar conduct after the event, even if it would amount to ratification in the ordinary case of principal and agent, will not make the creditor liable. The reasoning in *Wilson v. Tumman*,[145] the leading English case, is not overwhelming, and there seems no reason in principle to attach differing consequences to meddling conduct occuring before or after the seizure. Here again the Canadian law has not irretrievably opted for the *Wilson v. Tumman* rule, and the creditor seems in policy to be a suitable person to bear the loss, especially as he can protect himself by getting such information as he can before instructing his solicitor to proceed.

(c) Liability of the Creditor's Solicitor

(i) General

While there is a paucity of jurisprudence concerning the liability of a solicitor in the context of the enforcement of a judgment debt, it seems clear that, like the creditor, "if . . . [the] solicitor intervenes or meddles in the execution process, [he] may find himself liable to the claimant in trespass or conversion" where, for example, the claimant's property has been wrongfully seized.[146] The solicitor is liable where he endorses on the writ or in any other way communicates to the sheriff[147] the address of the claimant and the sheriff follows this direction to the prejudice of the claimant.[148]

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[142] (1887), 15 O.R. 346 (H.C.J.).

[143] *Supra*, note 131.

[144] Dunlop, *supra*, note 5, at 396 (footnote references omitted).

[145] (1843), 6 M. & G. 236, 134 E.R. 879 (C.P.).

[146] See Dunlop, *supra*, note 5, at 395, and sources cited therein.

[147] With respect to the English and Canadian law concerning whether the liability of the creditor is affected by the manner by which the creditor's solicitor instructs the sheriff, see Dunlop, *ibid.*, at 395-96, quoted *supra*, this ch., sec. 5(b)(ii). However, it should be borne in mind that, whatever the effect on the creditor's liability, the solicitor is liable irrespective of the manner by which he directs the sheriff to act. This is not, of course, to say that the creditor's solicitor is liable in all cases and for all purposes. For example, it was held in *Corbett v. McKenzie* (1850), 6 U.C.Q.B. 605, that the sheriff cannot sue the solicitor for poundage on an execution placed in the sheriff's hands by the solicitor.

[148] See *Jarmain v. Hooper*, *supra*, note 69, and *Morris v. Salberg*, *supra*, note 131. See, also, *Cordery's Law relating to Solicitors*, *supra*, note 52, at 110-11.

In addition, it has been said that, "when a writ of execution is set aside as illegally issued, or is issued and put in force after the debt has been paid or after a valid tender of the amount due, the client and solicitor are liable . . .".[149] However, at least in England, "neither of them is liable if it is left to the sheriff to do what is right"[150] or "if the indorsement [on the writ] is correct, so that the sheriff, although he seized the wrong goods, was not misled by it".[151] Finally, it bears emphasizing that, as a matter of practice, indemnification agreements executed by the creditor's solicitor now serve to transfer responsibility to the solicitor in a great many cases. We now turn to consider such agreements.

(ii) Indemnification Agreements

As a general proposition, it would appear that, while sheriffs attempt to obtain indemnification agreements from solicitors, as a matter of law a sheriff cannot refuse to execute a writ on the ground that an oral or written indemnification agreement has not been forthcoming.[152] However, it has been suggested that "the sheriff is on stronger ground if he asks for such an indemnity before seizing goods, the title to which is in dispute".[153] Indeed, in one such case, the Court in effect recommended that sheriffs obtain written agreements, calling into question the wisdom of relying on oral undertakings alone.[154]

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[149] *Halsbury's Laws of England* (4th ed., 1976), Vol. 17, para. 431, at 257-58 (footnote references omitted). See, also, *Cordery's Law relating to Solicitors*, *supra*, note 52, at 111.

[150] *Halsbury's Laws of England* (4th ed., 1976), Vol. 17, para. 431, at 258 (footnote reference omitted).

[151] *Ibid.*, para. 432, at 258 (footnote reference omitted).

[152] See *Harold v. Stewart*, *supra*, note 58. With respect to two statutory exceptions, see *infra*, this sec. In *Jarvis v. The Commercial Bank*, *supra*, note 52, the creditor refused – justifiably, in the Court's view – to indemnify the sheriff in respect of a seizure.

As to the possibility of an implied indemnity from the creditor's solicitor to the sheriff, see *Taylor v. Robertson*, *supra*, note 120, esp. at 630-31 and 632-33. The *Taylor* case also dealt with express indemnification (*ibid.*, at 633-34). The existence of an oral agreement was in issue in *Corbett v. O'Reilly*, *supra*, note 117. See, also, *Cordery's Law relating to Solicitors*, *supra*, note 52, at 111.

[153] Dunlop, *supra*, note 5, at 393. With respect to the seizure of property claimed by a third party, see s. 20 of the *Execution Act*, R.S.O. 1980, c. 146, discussed *infra*, this sec.

[154] See *Corbett v. O'Reilly*, *supra*, note 117, at 132-33, *per* Robinson C.J.:

> The principle of the protection designed to be given by the statute of frauds applies as well in regard to attornies as others, and there is the same justice in applying it; and though in a clear case the court does not allow the want of a written engagement to prevent their obliging an officer of the court to do what is just in a professional matter, yet it is salutary that the sheriff should be made to reflect upon the propriety of taking a precise written engagement from an attorney, when he meant to hold him liable in a case which he has nothing to do with except professionally. Attorneys have to act in a great number of cases, and it is not reasonable that they should be exposed to be attacked by applications of this kind, upon statements of mere conversation, in which a word or two more or less might shew the engagement to be intended to be binding or otherwise. By taking the trouble to obtain a written memorandum, the sheriff would be safe; attornies would know what they had to answer for, and would have no excuse for seeking to avoid their liability; and the court would be saved the unpleasant duty of having to determine between officers of the court who make contradictory statements upon oath.

The indemnification agreement used, for example, in the Judicial District of York provides that the creditor's solicitor "shall be liable for any costs, liens, chattel mortgages, expenses and damages which the Sheriff or his officers may be put to by the seizure or attempted seizure and subsequent proceedings if any, in the execution of [the solicitor's] instructions". Yet, notwithstanding the ostensibly broad coverage, a question arises whether the agreement would save the sheriff harmless in respect of, for example, negligent, wilful, or otherwise unauthorized wrongful acts. Some of the language used in the Alberta case of *Mandelin v. Stan Reynolds Auto Sales Ltd.*[155] lends some support to the proposition that the agreement would not cover such acts. In *Mandelin*, a chattel mortgagee provided the sheriff with an indemnification agreement under a distress warrant. In the agreement, the mortgagee undertook "to indemnify you [the sheriff] against any action which may be brought against you by reason of your acting under the authority of the foregoing". The sheriff's bailiff removed chattels located outside the sheriff's jurisdiction and exemplary damages were awarded in respect of the wrongful seizure. In holding that the bailiff was protected by the agreement, Mr. Justice Riley stated, by way of *obiter*, that he was "not suggesting that the indemnity agreement covers the bailiff for negligence or unauthorized action or wilful wrongdoing".[156]

Although Mr. Justice Riley's statement in *Mandelin* is, of course, only an interpretation of the particular contractual agreement in that case, it is not unreasonable to suggest that the traditionally narrow judicial interpretation of exclusionary and other similar clauses would lead an Ontario court to reach the same conclusion with respect to the indemnification agreements in use in Ontario. It seems likely that the sheriff is protected only from honest, non-negligent errors made as a result of following the instructions of the creditor. Whether a more comprehensive agreement, specifically covering, for example, negligent conduct by the sheriff, would be upheld by the courts is another matter.

In Ontario, statutory provisions deal with indemnification of a sheriff in two limited circumstances. First, section 19(6) of the *Execution Act* provides that the "sheriff is not bound to sue any person liable upon [a] cheque, bill of exchange, promissory note, bond, mortgage, specialty or other security unless the party who sued out the execution enters into a bond with two sufficient sureties to indemnify the sheriff against all costs and expenses to be incurred in the prosecution of the action, or to which he may become liable in consequence thereof . . .".

Secondly, by virtue of section 20(1) of the *Execution Act*, the "sheriff is not, without written instructions and a bond . . . obliged to seize property in the possession of a third person claiming it and not in the possession of the debtor against whose property the execution was issued". Under section 20(4), "[t]he bond shall be assignable to the claimant, and shall be conditioned that the persons executing it shall be liable for the

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[155] *Supra*, note 87.

[156] *Ibid.*, at 701.

damages, costs and expenses that the sheriff or the claimant may be put to by the seizure and subsequent proceedings, including interpleader proceedings, if any, and which he does not recover from other persons who ought to pay them".[157]

The legislation of several other Canadian provinces contains provisions similar to section 20.[158] However, the Alberta *Execution Creditors Act*[159] would appear to be unique in granting the sheriff a general right to demand security before he is required to make a seizure. Section 4(2) of the Act reads:

> 4.-(2) A sheriff is not bound to make a seizure under a writ of execution until he has been furnished with security which he considers to be reasonably sufficient for indemnity in respect of
>
> (a) his fees, charges and expenses, and
>
> (b) any claims for damages that might be incurred by him in making the seizure and levy and anything done in relation thereto.

6. ACTIVE ENFORCEMENT OF A JUDGMENT DEBT: PREVIOUS COMMISSION RECOMMENDATIONS AND FURTHER PROPOSALS FOR REFORM

(a) General

As already indicated, in Parts I, II, and III of this Report the Commission made several recommendations that either explicitly or implicitly dealt with the liability of the sheriff in respect of the enforcement of judgment debts. Our general aim was to reorganize, rationalize, and reform the law and practice, with a view, in part, to clarifying the role of the sheriff and rendering the rules governing his duties less amorphous and ambiguous. In many cases, we proposed the enactment of express statutory duties for the sheriff. In some instances, we specified that no liability should attach where the sheriff fulfils these duties. However, in other instances, we have said nothing respecting the liability of the sheriff. In the remaining sections, we shall review some of the more significant recommendations that relate to the liability of the sheriff and an instructing creditor in respect of seizure and sale of a debtor's property[160] and, having set

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[157] It bears mentioning here that the Commission has recommended that "the sheriff should no longer be empowered to require 'written instructions and a bond', as is now the case under section 20(1) of *The Execution Act*": see Commission Report, *supra*, note 1, Part II, at 288, Recommendation 11.

[158] See, for example, s. 34 of the Nova Scotia *Sheriffs Act*, R.S.N.S. 1967, c. 282, and s. 38 of the Alberta *Seizures Act*, R.S.A. 1980, c. S-11.

[159] R.S.A. 1980, c. E-14.

[160] Not all previous recommendations dealing directly or indirectly with the liability of the sheriff will be dealt with in this chapter. For example, we shall not consider our proposals respecting the seizure of property in the sole possession of a third party, nor those respecting the protection of a sheriff at interpleader proceedings. A discussion of these issues, and the resulting proposals, may be found in Commission Report, *supra*, note 1, Part II, at 33-39 and 259-86, respectively.

We also shall not consider our Part II proposals respecting the liability of the sheriff where property is seized in the sole or joint possession of the debtor. However,

the stage by means of this background material, we shall then offer further proposals for reform. While we do not propose to offer recommendations in respect of every type of activity or conduct for which the sheriff conceivably might be held legally responsible, we do wish to make recommendations in respect of certain matters of more significant concern.[161] In addition, we shall deal with the liability of execution creditors and their solicitors.

(b) Proposals for Reform

(i) Liability and Protection of the Sheriff

a. Liability Where the Sheriff Follows Directions from the Creditor or His Solicitor

What should be the position of a sheriff who, in enforcing a judgment debt and causing injury thereby, has followed the express directions of the execution creditor or his solicitor? In this connection, reference should be made to several Commission recommendations appearing in Part I of this Report respecting the duty of a sheriff to follow the instructions of an exe-

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we wish to clarify here the relationship between these proposals and our Part I proposals respecting the duty of the creditor to provide information to the sheriff and the sheriff's duty where such information is or is not obtained. In Part II, the Commission recommended as follows (Commission Report, *supra*, note 1, Part II, at 32 (footnote references omitted)):

> We recommend that, upon a creditor's instructions, the sheriff should be required to seize property in the sole or joint possession of the debtor. This duty should arise, and the sheriff should be protected from liability, unless the sheriff, acting in good faith, has some reasonable basis for believing that the property is not property in respect of which the debtor has some exigible right, title or interest.

In Part I, the Commission recommended (at 141) that, "upon his request to the sheriff to initiate enforcement measures, a creditor should be required to give, to the best of his knowledge, information concerning the debtor's property in respect of which the enforcement measure or measures are requested". The Commission then made several proposals that imply that, without the requisite information, the sheriff would not be obliged to seize. For example, the Commission stated (at 141) that "the absence of sufficient information concerning the debtor and his property may restrict or preclude active enforcement".

We wish to make it clear that, contrary to the impression that may have been given in Part I, the Commission is of the view that the sheriff should be *required* to seize property in the sole or joint possession of the debtor. No discretion would be permitted unless, of course, the sheriff, acting in good faith, reasonably believed that the property was not that of the debtor. Because the Commission did not wish to encourage uninformed seizures, we recommended that the creditor would be obliged to conduct public register searches and inform the sheriff of any encumbrances on the debtor's property. Moreover, the sheriff would conduct judgment debtor and third party examinations in aid of execution. Information might well arise that would alert the sheriff to the existence or likelihood of a claim to property in the sole or joint possession of the debtor. However, generally speaking, the absence of information would not affect the sheriff's duty to seize property in the sole or joint possession of the debtor.

[161] We wish to note here that the Commission is also engaged in a Project on Remedies for Wrongful Intentional Interference with Goods. This Project deals, in part, with certain topics – such as trespass and conversion – related to the liability of a sheriff for a wrongful seizure.

cution creditor. The recommendations read as follows:[162]

> 135. In the absence of any directions from a creditor, the sheriff should not commence active enforcement measures. The mere delivery of a writ of enforcement to the enforcement office should not constitute a sufficient direction by a creditor to the enforcement office to commence such measures.
>
> 136. Subject to the exceptions described in Recommendations 137 and 141, where a creditor has given express directions to the sheriff, the sheriff should be under a duty to follow those directions.
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> 137. The sheriff should not be under any duty to follow the creditor's directions where the sheriff knows or has reasonable grounds for believing that in so doing he would breach the provisions of a statute or regulation or otherwise commit an illegality.
>
> 138. A creditor should be entitled to authorize the enforcement office to use any and all enforcement measures essential to enforce the judgment, without necessarily specifying which particular measures ought to be employed. However, he should be required to make such an authorization expressly.
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> . . . .
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> 141. Where two or more creditors give conflicting or inconsistent directions to a sheriff concerning enforcement methods, the sheriff should be empowered to choose which enforcement method appears to be most beneficial to all the creditors. In selecting the most appropriate method, the sheriff should be under a duty to act reasonably and in good faith and should have regard to all the circumstances of the case, including the amount that is likely to be collected using each enforcement measure under consideration, the probable costs of each measure, the nature of the debtor's assets, and the wishes of other creditors.

Accordingly, initiation of enforcement measures against the debtor's property would have to await express directions from the creditor. The Commission was of the view that, once such directions were given, the sheriff should be under a duty to act, subject to the exceptions proposed in Recommendations 137 and 141.

Before offering our recommendations for reform in connection with the liability of a sheriff who has followed the creditor's directions, the Commission wishes to clarify the ambit of Recommendation 137. We did not intend to give the impression that the sheriff's ignorance of the *law* could be used by him as a defence in any subsequent proceedings taken against him. Let us assume, for example, that the creditor instructed the sheriff to seize some specific items of personal property on the debtor's premises. The critical issue, we believe, is whether the sheriff was aware of any *facts* that would involve a breach of a statute or regulation or the commission of an illegality if he were to seize the property. We were of the view that, if he was aware that the property did not belong to the debtor,

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[162] Commission Report, *supra*, note 1, Part I, at 187-88.

his ignorance of the law of conversion and trespass, for example, should not serve to justify any wrongful seizure.

We turn now to our recommendations for reform. Given the proposed mandatory statutory duty of the sheriff to follow the creditor's instructions, we believe that it would hardly be reasonable to saddle the sheriff with liability should loss be occasioned by his actions. Accordingly, we recommend that, where the sheriff follows the express directions of the creditor or his solicitor and he is not aware of any facts that would involve a breach of the provisions of a statute or regulation or the commission of an illegality, no liability should attach to the sheriff merely because he has engaged in enforcement activities pursuant to such directions and has caused injury thereby. However, the sheriff should continue to be liable for wrongful acts committed in the course of such enforcement activities. Therefore, while the sheriff should not be held liable merely, for example, because he has seized property in respect of which the debtor has no exigible right, title, or interest, or has made an excessive seizure, he should be liable for criminal acts, negligent conduct, intentional torts, or excessive use of force[163] in effecting the seizure.

The Commission believes that statutory protection ought not to be extended beyond what is reasonable. For example, an assault committed in the course of a seizure should continue to be actionable. On the other hand, it would not be negligent, for example, for the sheriff to fail to conduct a search in respect of the registration of a motor vehicle or in respect of a personal property security interest, having regard to our earlier general recommendation that "[t]he sheriff should not be responsible for the conduct of public register searches when enforcing money judgments obtained in any court".[164]

It bears emphasizing that the recommendations made in the preceding paragraph concerning the liability of the sheriff are of general application. The principles enunciated are not relevant solely in respect of wrongful seizure, but are equally applicable in the context of garnishment, an enforcement remedy that, except for wage garnishment in the provincial courts (family division), would come under the auspices of the proposed new enforcement office.[165] As in the case of a seizure, a creditor might specifically instruct the sheriff to garnish certain debts allegedly owing to the debtor. However, the creditor might be mistaken in his belief that any debt is owing or that a debt is owing by the putative garnishee. Or the creditor might misstate the amount owing to the debtor. Under these circumstances, the sheriff should be protected from liability if he did not know and had no reasonable grounds for believing that, in following the creditor's instructions, he would be engaging in a wrongful garnishment.[166]

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[163] With respect to the use of force, see Commission Report, *supra*, note 1, Part II, at 106-12. The relevant recommendations appear *ibid.*, at 300-01, Recommendations 81-85.

[164] *Ibid.*, Part I, at 192, Recommendation 173.

[165] See *ibid.*, Part II, at 307, Recommendation 135.

[166] It bears mentioning here that the sheriff would be far less likely to cause serious prejudice to a garnishee for an erroneous garnishment than he would to a true owner of property for a wrongful seizure of that property. In the first place, service upon the

In addition to execution against real and personal property and the garnishment of debts, a judgment debt might be enforced under the Commission's proposals by means of receivership, the new remedy that we have proposed should take the place of the present remedy of equitable execution.[167] Our recommendations respecting the role and powers of the receiver – which would be the enforcement office, in the person of the sheriff, unless otherwise ordered by the court[168] – deal implicitly with the issue of the sheriff's liability. The relevant recommendations[169] need not be repeated here. Suffice it to say that, as in the case of execution and garnishment, we see no justification whatever for subjecting the sheriff to liability where he has followed either the strictures contained in the proposed new legislation or the instructions of the creditor or his solicitor. Insofar as the potential liability of the receiver-sheriff in respect of his management activities is concerned, we are of the view that no special recommendations are required; consequently, the ordinary law relating, for example, to liability for negligent acts or omissions, would apply to the sheriff in the same manner as it would to any other person in a similar position.

We now turn to deal with two further matters respecting the liability of the sheriff where he has received instructions respecting the enforcement of a judgment debt. First, it will be recalled that, in Part I of this Report, we recommended that "[a] creditor should be entitled to authorize the enforcement office to use any and all enforcement measures essential to enforce the judgment, without necessarily specifying which particular measures ought to be employed".[170] The Commission wishes to supplement this recommendation with a further proposal, similar in principle to the one that was made in Part I in the analogous situation where the sheriff would be empowered to select the most appropriate enforcement method after two or more creditors have given him conflicting or inconsistent instructions.[171] We recommend that, where the creditor authorizes the sheriff to use any and all enforcement measures essential to enforce the judgment, without specifying which particular measures ought to be employed, the sheriff, in selecting the most appropriate measure or mea-

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garnishee of a notice of garnishment would bind only those debts actually owing by the garnishee to the debtor (see *ibid.*, at 309, Recommendation 150); if no debt was indeed owing, then the garnishment notice would not affect the garnishee's financial affairs.

In the second place, the garnishee would have the right to file with the enforcement office a dispute, setting forth the basis of his objection to the garnishment notice (see *ibid.*, at 309, Recommendation 151). In many cases, the dispute would be resolved informally, without the expenditure of any significant amount of money by the garnishee, particularly where the garnishment notice has been sent to the wrong person. But, it is conceivable that the alleged garnishee in such a case would have incurred certain administrative and other costs; in other cases, the garnishee would have expended certain sums on disputing the amount stipulated in the garnishment notice. However, for the reasons advanced, we are of the view that legal responsibility for such amounts should not be borne by the sheriff under the circumstances posited above.

[167] *Ibid.*, at 311, Recommendations 165 and 166.

[168] *Ibid.*, Recommendation 171.

[169] *Ibid.*, at 311-12, Recommendations 168-170 and 176-80.

[170] *Ibid.*, Part I, at 188, Recommendation 138.

[171] *Ibid.*, Recommendation 141, reproduced *supra*, this sec.

sures, should be under a duty to act reasonably and in good faith. The sheriff should have regard to all the circumstances of the case, including the nature of the debtor's assets, the amount that is likely to be collected under various enforcement measures, and the probable costs of such measures.

The second matter relates to the liability of the sheriff where, pursuant to Recommendations 138 and 141, reproduced above, the sheriff has fulfilled his statutory duties in selecting the most appropriate enforcement measure or measures. The Commission believes that it would clearly be impossible to justify liability under such circumstances. Accordingly, we recommend that the sheriff should not be liable where he has acted in accordance with the recommendations made in the previous paragraph or where he has acted in conformity with our Part I proposal respecting the selection of the most appropriate enforcement measure after the sheriff has received conflicting or inconsistent directions from two or more creditors.

b. Indemnification Agreements

We now turn to the practice of sheriffs requiring, or at least seeking, before executing the creditor's writ, an indemnification agreement from the execution creditor's solicitor or, occasionally, from the creditor himself.[172]

Whatever the present justification, whether legal or otherwise, for the use of indemnification agreements by a public official – a matter to which reference will be made below – we are of the view that, leaving aside indemnification respecting the costs and expenses of enforcement, our previous proposals concerning the liability of sheriffs would largely render such agreements functionless. Indemnification agreements are designed, at least in part, to save the sheriff harmless for acts done in the course of executing a writ. Even today, it is questionable whether such agreements would serve to protect a sheriff for negligent acts or intentional torts causing injury. If indemnification agreements do not cover these acts, they offer protection mainly where, in effect, the sheriff has acted reasonably and in good faith, and also in respect of the costs and expenses of enforcement by the sheriff. However, it will be recalled that, running through our proposals respecting the protection of the sheriff, either explicitly or implicitly, is precisely the principle or limitation that the sheriff should be saved harmless where he has acted reasonably and in good faith. Accordingly, the sheriff would not need to transfer liability to a creditor or his solicitor pursuant to an indemnification agreement.

In addition to the fact that the purpose of indemnification agreements would be dramatically circumscribed under the Commission's proposed new enforcement regime, it is submitted that there are philosophical objections to their continued use, at least insofar as they deal with indem-

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[172] With respect to the request for a type of indemnity directly from the creditor, see, for example, *Corbett v. O'Reilly*, *supra*, note 117.

nity beyond the costs and expenses of enforcement. The practice of seeking, and generally receiving, such agreements raises serious questions concerning the proper role of the sheriff, acting as a public official, in the enforcement of judgment debts. The Commission strongly believes that the present practice is inconsistent with the fact that the sheriff is a provincial official, neutral as between the contending parties and charged with enforcing money judgments obtained under a publicly-funded court system. It is also inconsistent with a proposed new regime expressly intended to remove unwarranted impediments to the enforcement of judgment debts.

The Commission is not unaware that, as a practical matter, the exaction of indemnification agreements does not appear, in itself, to have had a chilling effect on execution as a remedy for judgment creditors. However, it is not unlikely that most persons involved in the execution process have simply resigned themselves to certain practices, however bothersome or legally suspect, in order to have the sheriff get on with the business at hand. While this may well be the reason for the continued, although by no means universal, compliance with the sheriff's request for full indemnity, it ought not to be regarded as a satisfactory justification for the retention of the practice.

Having regard, therefore, to the broad scope of the Commission's proposals protecting the sheriff from liability, the very limited role of such agreements under our proposed new enforcement regime, and the philosophically and legally suspect practice of seeking and obtaining indemnification agreements to protect the sheriff as a public official, the Commission recommends that, subject to one exception, the sheriff should be precluded from requiring or accepting from a creditor, his solicitor, or any other person acting on the creditor's behalf, an indemnification agreement or any other kind of agreement, undertaking, or bond designed to save the sheriff harmless from liability in respect of any of his activities in the enforcement of a judgment debt. However, we do believe that the sheriff is justified in seeking to protect himself in respect of the costs and expenses of enforcement. Accordingly, as an exception to the general rule proposed above, we recommend that the sheriff should be entitled to require either a deposit or an indemnification agreement or any other kind of agreement, undertaking, or bond covering all or part of the anticipated costs and expenses to be incurred by him in the enforcement of a judgment debt.

In an effort to delineate clearly the role of the sheriff under our proposed new enforcement regime, and, therefore, to reduce the area of a sheriff's discretion in the enforcement of money judgments, we have recommended expansion of the protection to be afforded to the sheriff. His present position is precarious – straining to follow the command of the writ and the directions of the execution creditor, while at the same time, as a public official, attempting to remain impartial between the creditor and the debtor. The very nature of the enforcement process may give rise to honest errors of judgment. We do not believe that the sheriff should be held liable under these circumstances. Nor should the sheriff be held liable for merely following statutory or regulatory prescriptions.

c. Sale of Seized Property

As indicated earlier in this chapter,[173] the Commission has already made several proposals for reform in respect of the sale of seized property. Many of the recommendations – for example, those dealing with the time and location of sale and the manner of sale where the initial attempt to sell by public auction has been unsuccessful – empower the sheriff, acting reasonably and in good faith, to exercise his own discretion. Other recommendations – for example, the notice and advertising proposals – would impose certain mandatory duties on the sheriff. Where the sheriff is permitted to exercise discretion and is enjoined to act reasonably and in good faith, we believe that, if he acts in this manner, he should be protected from liability in any action by a person aggrieved by his activities. With respect to his mandatory duties, we also are of the view that the sheriff's performance of them should protect him from liability. Accordingly, to reflect these views – which conform to those enunciated earlier, for example, in the context of the seizure of property, garnishment, and receivership – we recommend that the sheriff should not be liable where he acts in accordance with the Commission's recommendations concerning the sale of seized property.

d. Application to the Court for Directions

In order to protect all parties involved in the enforcement process – sheriffs, creditors, debtors, and, for example, persons claiming an interest in property seized or about to be seized – we wish to make a further recommendation. While, under our proposals, the sheriff would have a clear idea of his duties in most cases, these proposals do envisage some residual discretion in the sheriff to refuse to act or, where he receives either general or conflicting instructions, to choose which enforcement method appears to be in the best interests of all creditors. In some instances, the sheriff may be in a quandary concerning which course he ought to follow.

At the present time, section 8(2) of the *Execution Act* provides that "[a] sheriff may apply to the county or district court of the county or district of which he is the sheriff for direction on any matter arising under sections 2 to 7" – that is, the sections dealing with chattels exempt from seizure. Section 8(2) is, then, a provision with a limited, although important, focus.

In connection with the sheriff's resort to the court for guidance, reference should be made to legislation in Alberta. Alberta has enacted a provision that, although it places a mandatory obligation on the sheriff to seek the court's guidance, is similar in principle to Ontario section 8(2);[174] however, it also has analogous legislation that is more comprehensive in scope. Section 39(1), (3), and (4) of the *Seizures Act*[175] provides as follows:

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[173] See *supra*, this ch., sec. 4(d).

[174] See *Exemptions Act*, R.S.A. 1980, c. E-15, s. 9: "If a claim is made for exemptions and a dispute arises in respect of the claim, the sheriff on his own motion shall refer the matter to the Court of Queen's Bench for summary determination, on such notice as the Court may direct."

[175] R.S.A. 1980, c. S-11. Subsection (2) deals with distress.

> 39.-(1) When the sheriff has any doubts as to the exercise by him of any power, duty or authority conferred or imposed on him by this Act, he may on his own motion apply to the Court for directions.
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> . . . .
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> (3) On an application under subsection (1) . . . the Court may, on whatever notice and to whatever parties it thinks proper, and after hearing any evidence that it considers necessary, make an order giving any directions consistent with this Act that it considers proper and convenient.
>
> (4) No action or proceeding of any kind lies against the sheriff for anything done pursuant to or in conformity with any directions so given.

A similar type of provision appears in the *Execution Creditors Act*[176] concerning "any question, doubt or difficulty [that] arises with regard to the exercise by the sheriff . . . of any power, duty or authority conferred upon him by" that statute.

The Commission believes that it would be in the best interests of all concerned if an actual or anticipated difficulty could be resolved by the court at an early stage rather than give rise to even more substantial problems later. Accordingly, we recommend that, where the sheriff has any question, doubt, or difficulty, or where any dispute arises, in connection with the exercise or intended exercise by him of any power, duty, or authority conferred or imposed on him by any enforcement legislation, or with any matter that arises in the enforcement of a judgment debt, he should be entitled to apply to the court for directions. The court should be empowered to hear the application with or without notice to all or some of the persons interested in the application, and to give whatever directions it deems proper. The sheriff should, of course, be protected from liability for acts done in conformity with the court's directions. Finally, it should be made clear that legislation implementing the above proposals should not affect the sheriff's right to interplead, as recommended in Part II of this Report.

(ii) Liability and Protection of the Creditor and His Solicitor

We have already seen that, although the law in the area is, at least in part, somewhat unclear, at common law liability may attach to a creditor and his solicitor for the wrongful acts of the sheriff.[177] In addition, some jurisdictions have enshrined certain aspects of this liability in legislation.[178] Finally, liability may be imposed upon a creditor by implication or upon his solicitor pursuant to an indemnification agreement.

Given the present law governing the liability of sheriffs, creditors, and solicitors, it is rare that an aggrieved person – for example, the true owner of property wrongfully seized – is without adequate recourse to compensa-

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[176] R.S.A. 1980, c. E-14, s. 39.

[177] See *supra*, this ch., sec. 5.

[178] See *supra*, note 116.

tion. Under our proposals, however, the nearly complete removal of liability from the sheriff – and, therefore, the Crown in most cases – would likely have a considerable negative impact on the ability of aggrieved parties to recover compensation for their losses. Eliminating the sheriff as a source of compensation would place liability, at least for the most part, squarely on the creditor or his solicitor. But, whereas, at present, the aggrieved party would normally have reasonable certainty that he could collect his judgment debt where he successfully sued the sheriff – given the fact that the Crown would ordinarily assume financial responsibility – no such certainty would exist where the defendant was the creditor, or even his solicitor, for they might well be impecunious or otherwise unable to pay the judgment debt. The proposed expanded immunity for sheriffs raises, therefore, significant issues concerning the person or persons who ought to bear the loss caused by a wrongful seizure.

The range of situations in which the issue of liability may arise is varied; in some instances, the creditor, his solicitor, and the claimant will have acted honestly and as reasonably as possible, whereas, in other cases, there will be differing degrees of negligence, carelessness, inadvertence, or even deceit. Quite clearly, it is difficult, if not impossible, to envisage legislation that will meet all these situations expressly.

Having examined the existing law respecting the liability of the creditor and his solicitor, and having considered several possible proposals for reform, we have come to the conclusion and, accordingly, recommend that, subject to one exception, to be discussed below, there should be no legislative intervention in this area of debtor-creditor law. Of course, the previous recommendations made by the Commission, including those concerning the liability of the sheriff, would apply. Therefore, while the sheriff would be protected where, basically acting reasonably and in good faith, he follows the strictures of the legislation and the instructions of the creditor or solicitor, under the new regime the court could continue to impose liability on creditors and solicitors in those cases in which liability is now imposed on them. For example, an express direction to seize a specific asset would result in liability if the asset belonged to a third party and not the debtor. We believe that any movement toward a stricter regime respecting liability would be manifestly unfair to creditors and their legal advisers, while a more lenient regime could place an aggrieved party in an untenable position, since he would no longer be able to seek redress against the sheriff in many situations.

In the vast majority of cases, the proposed statutory protection of the sheriff and the continued imposition of liability on creditors and solicitors in appropriate circumstances would not likely alter the present state of affairs in any material way, at least from the point of view of the latter two parties; as we have seen, the existing widespread use of indemnification agreements, the apparently implied indemnification of sheriffs by creditors, and the common law liability of creditors and solicitors independent of express or implied indemnification, now serve to place these persons at considerable risk, at least in theory, in a great many situations. It is certainly not clear that our recommendation would dramatically change this picture.

By the same token, the absence of any new statutory provision respecting the liability of creditors and solicitors would permit the courts to interpret and develop the law in a flexible manner. For example, in determining the liability of creditors and solicitors – and even claimants to seized property – the courts might look to the contribution provisions of the *Negligence Act*.[179] In assessing the degree of negligence exhibited by each of the parties, the court might have regard to such matters as whether a judgment debtor questionnaire, judgment debtor examination or, if appropriate, third party examination has been requested by the creditor and whether the creditor has conducted the relevant searches in public registers – such as the personal property security register – for security interests, liens, or other encumbrances. Or the court might consider whether a claimant who has lent the debtor the wrongfully seized property has been negligent in extending generosity to a debtor known by him to be financially reckless and hounded by creditors and the sheriff. Or the court might be influenced by the fact that the creditor and his solicitor have ignored certain obvious indications that the seized property was not owned by the debtor.

As stated above, the general recommendation that there should be no legislative intervention with respect to the law governing the liability of creditors and solicitors is subject to one exception. The genesis of this exception is the previously noted change in the position of an aggrieved party should our proposals regarding the liability of the sheriff be implemented. The Commission has given careful consideration to the situation where an aggrieved party, successful in whole or in part against, for example, the creditor or his solicitor, or both, is unable to collect all or part of his money judgment because the defendant or defendants is or are without sufficient financial resources.

On the one hand, it may be said that the absence of a real remedy arising from the unsound financial status of a defendant is hardly novel in debtor-creditor relations. The law does not normally come to the rescue of successful plaintiffs stymied for this reason. However, it does bear repeating that the Commission's earlier proposals protecting the sheriff would remove from the picture a significant source of compensation for aggrieved parties. This alteration would bring in its train a potential reduction in the chances of aggrieved parties receiving full, or even partial, compensation for their losses.

Having regard to this not improbable state of affairs, the Commission recommends that the class of claims that may be compensated by means of the proposed new assurance fund, described earlier in this chapter,[180] should be expanded to include claims for compensation by a plaintiff who is successful in an action arising out of a wrongful act by the sheriff in the context of the enforcement of a judgment debt and who, as a result of the financial status of the person held to be liable in that action, is unable to obtain full payment of the money judgment rendered in his favour against

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[179] R.S.O. 1980, c. 315.

[180] See *supra*, this ch., sec. 3(a).

such person. We are of the view that the use of the assurance fund is warranted where an aggrieved party is unable to collect the full amount of his judgment debt, having regard to the fact that, in most cases, he would not have access to the sheriff and, therefore, the Crown. The fund, however, would remain a secondary source of compensation, available only where the defendant – or his insurer, in the case of a solicitor, for example – did not satisfy the full measure of the judgment debt.

Recommendations

The Commission makes the following recommendations:

1. (1) Where the sheriff complies with the new rules respecting the reporting of writs on file at the enforcement office (see Part III, Recommendation 21(9)), he should be protected from liability.

   (2) Where the sheriff has not complied with such rules, a creditor aggrieved by the sheriff's actions should be required to look only to the proposed new assurance fund (see Part III, Recommendation 21(16)) if he seeks compensation; he should have no cause of action against the sheriff.

2. (1) The class of claims that may be compensated by means of the proposed new assurance fund should include not only claims by a creditor wrongfully deprived of his rights by the actions of the sheriff in erroneously providing a clear certificate notwithstanding the existence of the creditor's valid writ (see Part III, Recommendation 21(16)(a)), but also claims for compensation by any other person prejudiced because of the provision of an erroneous sheriff's certificate.

   (2) The person prejudiced because of the negligent provision of an erroneous sheriff's certificate should be required to look only to the assurance fund if he seeks compensation.

   (3) In addition to the levy recommended to be added to the cost of lodging writs of enforcement with the sheriff for the purpose of establishing and maintaining the assurance fund (see Part III, Recommendation 21(16)(b)), a levy should be required to be paid by all persons requesting from the sheriff information concerning writs of enforcement lodged in the enforcement office.

3. Where the sheriff fails to include a creditor in a distribution of the proceeds of an enforcement measure, so that the creditor is not paid the share to which he is entitled under the proposed new creditors' relief legislation, and the other creditors are, therefore, overpaid,

   (a) the court, on application of the creditor, should be empowered to make whatever order seems just and reasonable under the circumstances, including setting aside the distribution, requiring repayment, awaiting a subsequent distribution to correct the overpayment, or entitling the creditor to compensation from the proposed new assurance fund; and

(b) the sheriff should not be liable for failure to pay the creditor his share of the proceeds.

4. (1) Where the sheriff follows the express directions of the creditor or his solicitor and he is not aware of any facts that would involve a breach of the provisions of a statute or regulation or the commission of an illegality (see Part I, Recommendations 136 and 137), no liability should attach to the sheriff merely because he has engaged in enforcement activities pursuant to such directions and has caused injury thereby.

(2) However, the sheriff should continue to be liable for wrongful acts committed in the course of such enforcement activities, such as criminal acts, negligent conduct, intentional torts, or the use of force that goes beyond that proposed by the Commission in Recommendations 81-85 of Part II.

5. (1) Where the creditor authorizes the sheriff to use any and all enforcement measures essential to enforce the judgment, without specifying which particular measures ought to be employed (see Part I, Recommendation 138), the sheriff, in selecting the most appropriate measure or measures, should be under a duty to act reasonably and in good faith.

(2) The sheriff should have regard to all the circumstances of the case, including the nature of the debtor's assets, the amount that is likely to be collected under various enforcement measures, and the probable costs of such measures.

(3) The sheriff should not be liable where he has acted in accordance with the recommendations contained in the preceding paragraphs.

6. The sheriff should not be liable where, in selecting the most appropriate enforcement method after receiving conflicting or inconsistent directions from two or more creditors, he acts reasonably and in good faith and has regard to all the circumstances of the case, including the amount that is likely to be collected using each enforcement measure under consideration, the probable cost of each measure, the nature of the debtor's assets, and the wishes of other creditors (see Part I, Recommendation 141).

7. (1) Subject to Recommendation 7(2), the sheriff should be precluded from requiring or accepting from a creditor, his solicitor, or any other person acting on the creditor's behalf, an indemnification agreement or any other kind of agreement, undertaking, or bond designed to save the sheriff harmless from liability in respect of any of his activities in the enforcement of a judgment debt.

(2) The sheriff should be entitled to require either a deposit or an indemnification agreement or any other kind of agreement, undertaking, or bond covering all or part of the anticipated costs

and expenses to be incurred by him in the enforcement of a judgment debt.

8. The sheriff should not be liable where he acts in accordance with the Commission's recommendations concerning the sale of seized property (see Part II, Recommendations 95-104).

9. (1) Where the sheriff has any question, doubt, or difficulty, or where any dispute arises, in connection with the exercise or intended exercise by him of any power, duty, or authority conferred or imposed on him by any enforcement legislation, or with any matter that arises in the enforcement of a judgment debt, he should be entitled to apply to the court for directions.

(2) The court should be empowered to hear the application with or without notice to all or some of the persons interested in the application, and to give whatever directions it deems proper.

(3) The sheriff should not be liable for acts done in conformity with the court's directions.

(4) Legislation implementing the recommendations in the preceding paragraphs should not affect the sheriff's right to interplead (see Part II, Recommendations 192-219).

10. (1) Subject to Recommendation 10(2), and to the previous recommendations made by the Commission in this Report, there should be no legislative intervention with respect to the law governing the liability of creditors and their solicitors.

(2) The class of claims that may be compensated by means of the proposed new assurance fund should be expanded to include claims for compensation by a plaintiff who is successful in an action arising out of a wrongful act by the sheriff in the context of the enforcement of a judgment debt and who, as a result of the financial status of the person held to be liable in that action, is unable to obtain full payment of the money judgment rendered in his favour against such person.

CONCLUSION

The publication of Part V of the *Report on the Enforcement of Judgment Debts and Related Matters* brings to an end the Commission's Enforcement of Judgment Debts Project. The reforms proposed in chapter 2 of this final Part of the Report seek to ensure that the conclusion of the enforcement process is marked by equity and fairness to all concerned. The simplified scheme of rateable distribution of proceeds of enforcement, along with a clearly established scheme of priorities, will do much, in our view, to alleviate the uncertainty and, in some cases, injustice, that permeates this stage of the enforcement process. The recommendations in chapter 3 respecting postjudgment arrest, we believe, would retain the benefits of this ultimate sanction while safeguarding the rights and freedoms of debtors. Given our earlier recommendations respecting the remedies of seizure and sale and garnishment, for example, the Commission is of the view that arrest and imprisonment of defaulting debtors who are able to pay, or who have taken steps to frustrate the enforcement efforts of their creditors, will become truly a remedy of last resort. The proposals for reform contained in chapter 4 concerning liability of sheriffs, creditors, and solicitors in the enforcement of judgment debts – for example, the use of the proposed assurance fund to compensate aggrieved creditors and others, and the clarification of the liability of sheriffs – would enhance the effectiveness of the enforcement process while, at the same time, protecting the interests of all concerned.

This Part of the *Report on the Enforcement of Judgment Debts and Related Matters*, like the first four Parts of the Report, is the culmination of many years of research and study by two of the Commission's legal staff, M.A. Springman, Senior Legal Research Officer, and E. Gertner, Legal Research Officer. Their contribution to the Enforcement of Judgment Debts Project in general, as well as to this Part of the Report, has always been of the highest quality and, once again, we would like to express our deepest appreciation to them for a job well done. Similarly, we are grateful for the excellent guidance and assistance to this Part of the Report and the Project as a whole provided by M.P. Richardson, Counsel to the Commission. The quality of the *Report on the Enforcement of Judgment Debts and Related Matters* is in no small measure attributable to her

efforts. Finally, we would like to thank once again David E. Baird, Esq., Q.C., for the practical wisdom he imparted unsparingly to the Commission throughout the Project.

All of which is respectfully submitted.

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Chairman

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